# Invalidating Laws

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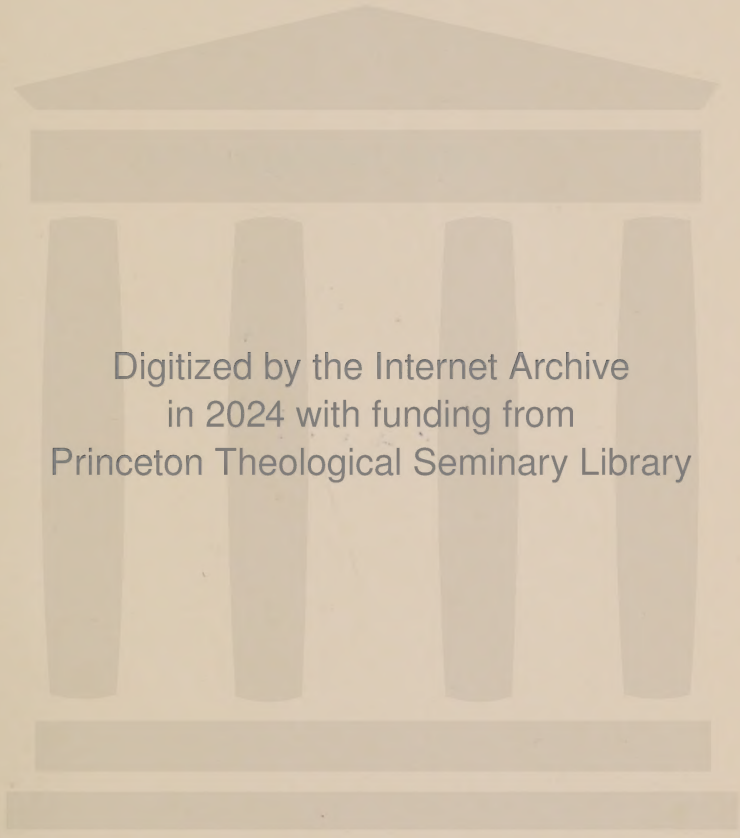

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# FOREWORD

Invalidating laws are among the best illustrations of the operation of positive law in its control of the rights of subjects. There is no doubt that there is a constant need for a thorough knowledge of invalidating laws. Not only is this knowledge necessary for the professional canonist, but its necessity is manifest every day in the work of diocesan officials and parochial clergy. It is not sufficient merely to know the text of canon 11. It is of equal importance both to know where invalidating laws occur in the Code of Canon Law and to know the presumption to be followed when an invalidating clause is not obvious. There is the serious danger of assuming too soon that an invalidating clause is doubtful. Hence, it is of the utmost importance to know upon what basis a presumption for validity of acts is founded.

The method followed in the present study considers both historical and contemporary doctrine on invalidating laws. Too much stress cannot be laid on the historical approach to the investigation of canon law. The length of time which can be devoted to such investigation naturally will depend upon particular circumstances, but in no case should the history of any part of canon law be ignored. Anyone who knows merely the text of the Code of Canon Law, or, more particularly, the text of invalidating laws in the Code, will possess inadequate knowledge; the whole field of the development of canon law will be a closed book to him. Obviously, the ignoring of centuries of jurisprudence is not desirable either in the training of a canonist or in his subsequent work.

The historical approach to the study of canon law is a necessary preparation for the study of contemporary doctrine. Once the former has been sufficiently digested, the latter will be more easily understood. With a firm foundation in the history and

development of invalidating laws, the student can approach with considerable confidence the prescriptions of the pertinent canons in the Code. From this point on, attention can be centered on contemporary doctrine.

Several chapters of the present study of invalidating laws have already appeared in *The Jurist,* 1943. These chapters were published as articles discussing the concept, interpretation and obligation of invalidating laws, and the power to enact them.

Since this book was written, several of the authors cited and consulted have published new editions of their work. Nothing, however, in these new editions would dictate any change in the text of this book.

The author acknowledges the kindness of his friends and thanks them for their counsel. Particular gratitude is expressed to the late Very Reverend Gerald A. Ryan, J. C. D.

— Edward Roelker

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# INVALIDATING LAWS

## Chapter I

# THE CONCEPT OF INVALIDATING LAWS

WHILE the concept of invalidating laws could be immediately and definitely established by an investigation of the philosophy which underlies them, it might be better to approach the study of the nature of these laws from a consideration of their scope. The application of a law is a practical thing. Theory does not hinder it, but to know merely the nature of invalidating laws would be insufficient, since (as one later realizes) these laws are not always applied according to their nature. Law is not entirely philosophy. Hence, concepts which could readily be understood must sometimes be held in abeyance until the use of the laws developing from these concepts is carefully observed and adequately investigated.

In order, then, to establish the nature of invalidating laws, it has been considered useful to study first the scope of these laws. Such study will aid greatly in determining whether they are penal or non-penal in nature.

In regard to the scope of invalidating laws, two opinions exist. The first considers an invalidating law as covering any deficiency in the natural constitutive elements of an act.[1] Thus the lack of consent in entering a contract, or an inability to act by reason of age, or a prohibition as the result of a penalty, can all be determining factors in identifying an invalidating law. The second opinion[2] considers an invalidating law as operating only when the natural constitutive elements of an act are actually present. Thus an act invalid by the law of nature would not be covered by an invalidating law. The same would be true whenever the divine positive law intervened to make an act invalid or to render persons unable to act.

There is little doubt that, in a broad sense, any law that declares an act invalid is an invalidating law. However, not every act invalid by the law of nature or by the divine positive law is covered by the disciplinary law of the Church. It is true that certain canons of the Code do state a prohibition of the natural law or announce the definite will of Christ. Such canons as 968, § 1, and 1081[3] are not matters primarily of discipline. Rather, they are items of theology and natural law and could be studied independently of any system of discipline. Hence, to include such items among those covered by invalidating laws, while not of course incorrect, would obviously interfere with any clear-cut analysis of the nature of invalidating laws. The Code of Canon Law is primarily a collection of disciplinary laws; and distinctions, descriptions and analyses should, if possible, be based on that idea. Throughout the present work, then, the second opinion mentioned above will be adopted in considering invalidating laws. Definite rejection of the first opinion is not intended, since the Code of Canon Law does consider acts invalid by divine law. But these canons will not be stressed, as they do not belong entirely to a disciplinary code. It is useful to find these canons where actual discipline is regulated. Their inclusion in the Code of Canon Law assists toward obtaining a complete view of the subject to be studied. Yet in the Code of Canon Law discipline is stressed, and for this reason the first opinion mentioned above will be a less satisfactory guide than the second.

An invalidating law can consider either the person performing the act, or the act performed. In either case the legal effect of an act is denied: this is the meaning of an invalidating law expressed in simple terms. For sufficient reasons, the legislator renders a person unable to act or, if he is able to act, annuls his act. This is a legal circumstance, and has no direct reference to physical capacity or to possible damage involved. Moreover, no question of good or bad faith arises. It is conceivable that a person may act in the best of faith according to what he thinks is the law; and yet, despite his best intentions, his act will be in-

valid. Or a person may actually feel that he is excused from the rigorous requirements of an invalidating law, but if he acts without a dispensation from this law, his act will be invalid.

The invalidity of an act that results from the transgression of an invalidating law is in no sense always to be considered a punishment.[4] It is true that a contract entered upon through simony is invalid,[5] and that this invalidity could reasonably be interpreted as a punishment for the crime of simony. Yet this law is only one of a hundred cases in which acts are declared by law to be null and void, in most of which cases the question of penalties does not arise.[6] It is necessary and fundamental to keep this idea in mind. Were the invalidity of an act always a penalty, it would fall under the interpretation of penalties. Therefore, for instance, many acts controlled by invalidating laws would be valid but rescindable. This is not true. Further, ignorance of a penalty at times excuses from its incurrence, but such ignorance is no help in avoiding the effects of an invalidating law.[7]

There is some resemblance to penalties in invalidating laws. But this resemblance is only specious, and if the distinction between the two is not definitely made, confusion and incorrect interpretation will result. Later in these pages, an analysis of the penal aspects of an invalidating law will be undertaken.

An invalidating law need not be expressed in prohibitory words. Many invalidating laws are, as a matter of fact, so expressed,[8] but this is not essential. If the legislator requires certain solemnities to surround the performance of an act, he states these solemnities in a positive way. The same is true if certain conditions are laid down before a person can act validly. In these cases, the legislator states how he wants an act to be performed, or under what conditions he will recognize the act. In expressing his will, the legislator will use positive terms. He may, of course, add some injunctions in negative terms, but these will be at most a restatement or clarification of his will. Hence it will be an error to seek an invalidating law only when the law is expressed

in prohibitory words. It is easy to make this mistake, because frequently an invalidating law is classed as a prohibitory law. Such classification is useful to set off the difference between laws that merely prohibit and laws that render an act invalid. To go beyond this and limit invalidating laws to the class of prohibitory laws, would be a serious error. Under the influence of such an error, one would be at a loss to explain how the lack of certain formalities could vitiate a testament or a religious profession.

As Michiels[9] warns, there is a difference between an "irritating law" (*lex irritans*) and an "inhabilitating law" (*lex inhabilitans*). The difference, however, is not to be found in the relative validity or invalidity of the act performed but in the aspect under which the invalidity of the act is determined. While this difference is important in itself and interesting to study, the effect of the two laws is the same. Nevertheless some description of these laws should be offered. It will serve no useful purpose here to expatiate at great length on how they coincide in effect. For practical purposes it is the legal recognition of an act or the absence of such recognition that is the important thing. Of course, it is necessary to know whether one is competent to act legally, just as it is necessary to know what formalities are required in order to act validly. But the present study is not primarily designed to point out when a man is able or unable to act, or to show what formalities are essential to the act, but rather to consider and weigh the effect of an act performed contrary to the tenet of an invalidating law.

However, it will not be amiss to outline the difference between *lex irritans* and *lex inhabilitans*.[10] An "irritating law"[11] directly considers the act performed and denies it validity. Questions concerning the competence of persons to perform such an act are not considered. A law, for instance, that demands a certain form or that requires certain definite signatures, applies to all who care to perform an act controlled by this law. An example could be found in canon 1094.[12] According to this canon a marriage is valid only when it is celebrated in a definite way.

This way is clearly indicated. Any deficiency vitiates the act. It does not matter in the least that the contracting parties are physically able and morally willing to enter marriage. They are bound to observe a definite form of marriage. If this form is ignored or only partially observed, the marriage is invalid. In this way, the law directly considers the act performed and judges it valid or invalid according to the prescriptions of the law. This species of invalidating law presupposes the legal competence of persons who wish to perform an act. And the point to remember is that the act itself is considered and weighed, not the persons who perform the act.

An "inhabilitating law"[13] directly considers the person who performs or attempts to perform an act. This species of invalidating law establishes a legal incompetence. Again, it has nothing to do with a person's physical capacity or his moral willingness. Obviously, in judging the validity of an act, legal competence or legal incompetence to act is the first thing to consider. If a man is canonically unable to perform an act, his act, if it exists at all, must be invalid. Examples could be multiplied in the Code of Canon Law. One or two will suffice. Canon 1067, § 1,[14] forbids marriage under a certain age. In the law it is clearly established that this age must be arrived at before marriage can exist. Consequently, anyone below this age is canonically unable to marry. It is an impediment that ceases in time, but as long as it exists, it effectually invalidates any marital union. Another example: canon 1077 forbids marriage to those within certain degrees of affinity.[15] This prohibition clearly establishes the forbidden degrees, so that an act contrary to this law is invalid. No choice or option is conceded in this kind of invalidating law. Circumstances do not alter the case. A person either is included or he is not included under the legal incompentence established by the law.

Naturally there is no intention here to exclude possible dispensation from either kind of invalidating law; frequently such

dispensation can be obtained. All that is intended is a description of the operation of invalidating laws.[16]

While, then, there is a difference between "irritating" and "inhabilitating" laws, the two will be considered together in this study.[17] It would be inconvenient and tedious constantly to repeat these terms; nor would it be necessary, as the invalidity of the act performed is common to both laws. Usually, in referring to these laws, it will be abundantly clear which one is meant. To indicate both laws, the expression "invalidating laws" will be used. Whenever more detailed expression is required, it will be used.

The above description recalls what has been said about the scope of invalidating laws. These laws must be thoroughly understood. It would be unjust to deny a man's right to act under the law unless his incompetence can be clearly and unmistakably demonstrated. Similarly, it would be unjust to annul an act unless invalidity could be rightly shown. A person, as a member of a society, possesses some rights but does not necessarily possess all rights. What rights are denied him should be just as clearly indicated as what rights are conceded to him.

The nature of invalidating laws is clear enough today, but earlier canonists were not equally certain. The controversy concerned itself with the possible penal effects of an invalidating law. Opinions were divided. Some canonists[18] held that the invalidity of an act was a penalty even though this was not specifically stated. Other canonists[19] denied this penal aspect of an invalidating law and claimed that such a law was merely directive. No canonist, however, denied the existence of invalidating laws or questioned the power of the legislator to enact such laws. Suárez,[20] who writes in detail of invalidating laws, says he takes such laws for granted from their use alike in civil and canon law. In fact, one of the evident items in these two fields of law, both in history and in present use, is the constant existence of invalidating laws. Controversies did occur regarding their nature, their identification and their application, but no one denied their

existence or seriously challenged the right of the legislator to enact them.

While the existence of invalidating laws was and is unquestioned, it will be interesting to see how earlier canonists viewed the nature of such laws.

In favor of the penal aspect of an invalidating law were ranked some canonists of considerable weight.[21] Their individual opinions will be examined presently. In general, their arguments proceeded as follows: A grave inconvenience and harm is done to a man whose act is said to be invalid; therefore, such restriction to his natural liberty can be considered only in the light of a penalty. This penal aspect was predicated both in laws that declared a man unable to act and in laws that demanded certain formalities.

A corroborative argument was deduced from the interpretation of invalidating laws. This was the argument: If an invalidating law is not penal, then it ought not to be of restrictive interpretation; but, since such interpretation is common, it follows that an invalidating law is penal in nature.

To assert that an invalidating law is penal because it restricts freedom to act, is to say that every prohibitory law is a penalty. Further, such restriction can be found in any law which regulates the public or the private order. It is essential in a regulation that some restriction be exercised. This will naturally involve surrender of such freedom to act as the individual would otherwise enjoy. Yet it would not occur to anyone that all these restrictions are penalties.

Further, if the grade of restriction in an invalidating law be urged as the reason why such a law should be considered penal, the reply is that the grade of restriction would not change the character of the law. The recognition which the legislator will accord an act in law depends on the reasons he has for the enactment of the law. These reasons can range over a wide field without necessarily including sanctions. If we suppose that the danger of fraud is the reason why certain formalities are required in

a testament, the idea of a penalty would not be found in a law which controls the making of a testament. Normally, everyone is free to bequeath his property to whomsoever he wishes, but if these bequests are to be valid in law, certain stipulations are demanded so that the free will of the testator can be proved. It is to guard against possible fraud or possible force brought to bear on the testator that the legislator insists that the formalities be observed. It is, then, the possible crime of others which is restricted. This outweighs the restriction which is put on the testator, obliging him to make his testament in a prescribed way.

Again, if we suppose that a person is forbidden to act legally in a certain matter by reason of a law which declares him incompetent to act, there is no necessary connection with penalties.[22] It is true that certain acts will result in an impediment,[23] and this impediment can well be considered as a penalty for such an act. But this is merely to say that an invalidating law can at times be penal. There is no quarrel with this statement. Penalties take various forms and invalidity of certain acts can be understood as a penalty. However, invalidity of acts is not restricted to laws which punish crimes. Clerics in sacred orders, for instance, are forbidden to marry.[24] They are not forbidden to marry because of crime but because of their state in life. The prohibition has attached to it an invalidating clause which does not operate until the law is disobeyed, but the reason for its existence is not found in disobedience to the law but in high regard for the clerical state.

Other examples might be adduced, but these will suffice.

The corroborative argument which was deduced from the interpretation of invalidating laws and purported to identify such laws as penal, is the result of oversimplification. It is asserted that since invalidating laws are restrictively interpreted, they must be penal laws. The assumption is that only a penal law can be thus interpreted. This assumption ignores the fact that certain restrictions are found in all laws because the aim of all laws is to regulate. This regulation, as was mentioned before, is not

necessarily a penalty but rather a means of establishing and conserving order.

Yet, since invalidating laws do require certain formalities to be fulfilled, or do actually establish legal incompentency to act, they must be interpreted strictly. There is no doubt that they impose restraints on the natural freedom of man to act, and therefore these restraints are not to be presumed but must be proved. No one could reasonably be regarded as surrendering more freedom than the law demands. In this way, the interpretation of an invalidating law will proceed parallel with the interpretation of a penal law. But this is no justification for maintaining that an invalidating law is a penal law.

The canonists who held that opinion, appealed for support to several decretals. An investigation of these will show whether any appreciable support can be found to maintain the opinion.

The first decretal to be studied is extremely important. It was issued by Pope Innocent III,[25] and furnishes a source for the law on rescripts. Distinguishing between the malicious suppression of truth or the malicious narration of falsehood, and the non-existence of truth which results from a petition made in good faith, the Pope says that if a rescript is obtained through fraud the grantee shall receive no benefit, in penalty for his malice, and the rescript is null and void.[26] While the Pontiff expresses his mind as if he were actually punishing a crime, he is really indicating that without a sufficient reason in truth he will not grant a valid rescript. The mind of the Pontiff is clear that a relation must exist in truth before he will concede a favor. This is not surprising, for normally the general law will control the actions of men, and any exception must be based on truth. Pope Innocent III does not deny that he can, by reason of his own sufficient power, grant the favor requested, but in a rescript he is considered as moved by a truthful plea; when the plea is not in fact true, his benevolence cannot be abused. Consequently, instead of pressing the meaning of the Pontiff's words to indicate the penal nature of an invalidating law, it is fairer to interpret them as insist-

ing on the requirements for the issuance of a valid rescript. Thus, if these requirements are not honestly met, the rescript is invalid. Pope Innocent III is applying the law of Pope Alexander III.[27]

It is true that Innocent III in the same decretal gives a milder interpretation of requirements for a valid rescript when he says, in effect, that if through ignorance an untruthful reason is proposed for the exercise of his benevolence, a further distinction must be made. Given that the suppression of truth or the narration of falsehood is such that if in fact truth had not been suppressed or falsehood narrated, the Pontiff would have conceded the favor, the rescript is valid; otherwise it is invalid. In this way Pope Innocent III shows that he is willing to supply some deficiencies, but not all. This is an exercise of his benevolence in suspending in some cases the requirements for the issuance of a valid rescript. Indirectly, however, the Pontiff insinuates that these requirements are of law and must be met faithfully.[28]

In a word, then, this decretal of Pope Innocent III cannot be urged as entirely supporting the penal nature of an invalidating law. The words of the Pontiff do not necessarily mean that invalidity is a penalty. They can be interpreted as indicating that the Pope will not supply any deficiency which results from bad faith.

Another decretal cited in favor of the penal nature of invalidating laws is one of Pope Gregory IX.[29] It need not be examined in detail because it does not indicate anything at all about the nature of invalidating laws. It speaks of the abuse of a right granted through a rescript, and establishes as a penalty for this abuse the loss of the said right. Obviously this has nothing to do with the initial petition for and the actual issuance of the rescript. In order to deprive the grantee of his right, it is obviously necessary that the right be validly conferred; what happens later is something that in no way affects the issuance of the rescript. Hence, to allege this decretal as supporting the penal nature of an invalidating law is to misunderstand the purpose for which

Pope Gregory IX issued it. A penalty was certainly imposed in it, but this was in no way connected with the granting of the rescript.

Also adduced in favor of the penal nature of invalidating laws is a decretal of Pope Gregory X, which was enacted in the second general Council of Lyons.[30] This decretal describes the local immunity of a church and speaks of various activities which are contrary to this immunity. Thus, for instance, clamorous gatherings of the people, markets, public meetings are forbidden in the church. The decretal continues with a prohibition against the use of a church as a secular courtroom, the Pontiff declaring a judicial sentence pronounced in the church to be invalid.[31]

In order to understand the force of this prohibition, it is necessary to recall the scope of local immunities. A church possessing immunity was free of all secular control, and its administration and use were entirely in the hands of clerics. This meant that civil courts were entirely barred from any jurisdiction over the fabrics of the church (*fabrica ecclesiae* — the church and its material accessories), nor could they use the church as a place for holding legal sessions. In other words, a church was not only an unsuitable place in which to hold a court, but it was actually exempt from such use. How far the civil power admitted such exemption is immaterial, for the Church considered herself competent to declare and interpret her own immunities. Hence, in theory at least, and to a large extent in fact, the church was outside the range of civil jurisdiction. Consequently, Pope Gregory X could legally declare a judicial sentence invalid because it was not given according to the stipulations of the law. The canon law required permission of the competent authority of the Church before an immunity could be disregarded. If this permission were not obtained, the Church would not be obliged to recognize the judicial sentence of the civil court.

It must not be imagined that Pope Gregory X is here infringing on the rights of the civil authority. On the contrary, the Pontiff is urging the observance of civil law, which recognized immunities, in part at least. If the decretal be understood in this

light, Pope Gregory's declaration of the invalidity of the judicial sentence resolves itself into a demand that the stipulations of both canon and civil law be executed. Failing this, the Pontiff does not grant a dispensation from the canon law on immunities, and therefore he must declare the judicial sentence pronounced in a church to be invalid.

Given this explanation of the decretal, it is difficult to see how it demonstrates the penal nature of an invalidating law. A penalty is a specific item, and not to be confused with the principal effect of an act. In the decretal under discussion, it is the lack of permission from a competent authority which vitiates a given judicial act. The principal effect, then, of this defective act is invalidity. This is all that Pope Gregory X says. He states that the judicial sentence pronounced in a church is invalid. His reason is the exemption of the church from civil jurisdiction and from use as a courtroom. He is not punishing the civil judge for disobeying the law on immunities, by declaring his sentence invalid.

This argument is strengthened by the fact that nowhere in his decretal does the Pope inflict penalties for the misuse of the church. Not until the very end does he even threaten punishments. Throughout, he speaks of the sanctity of a church and the great reverence with which it ought to be regarded. He deplores the actual abuses which permit the church to be used as a popular meeting house. But it is only when there is a conflict of jurisdictions and the matter has not previously been adjusted that the Pontiff makes his pronouncement on the validity of the judicial sentence. This can hardly be considered a penalty. It seems far more reasonable to say that the Pontiff maintains the judicial act is invalid because it is not pronounced according to the requirements of law.[32]

A decretal of Pope Boniface VIII is likewise adduced in favor of the penal nature of an invalidating law. This decretal concerns the election of a religious superior.[33] The case is easily outlined: A religious had been elected to an office outside his own

monastery or church, and had presumed to consent to the election without obtaining permission to do so. Pope Boniface VIII declared the election invalid and said this declaration was in punishment of such presumption.[34]

An analysis of the decretal indicates that the Pope is declaring the election of the religious invalid because it has not proceeded according to law. The prescription of law which requires the permission of the superior of the religious has been neglected, and because of this neglect the election is invalid. Thus the decretal is merely a declaration that certain formalities must be fulfilled if an act is to be accorded legal recognition. This is the principal idea in the decretal; the way in which the Pope expresses the idea is secondary. He does say that the election of the religious is invalid because of his presumption in consenting to this election without the permission of his superior; but the law would still operate even though this permission had been neglected in good faith. The most, then, that can be said of this decretal of Pope Boniface VIII is that it has a penal aspect. It would be pressing the actual words of the Pontiff too far to say that he is characterizing an invalidating law as penal.

In this decretal as well as in the earlier one of Pope Innocent III, the main features of the law are neglected in favor of definite words picked out to support a contention. The context of these words is thus lost in the discussion of an issue. Obviously, this is not interpretation which proceeds in orderly fashion and according to rule.

The extreme care with which Pope Boniface VIII sought to have the prescribed conditions of law fulfilled is abundantly evident in several of his decretals. A brief review of these shows that where an invalidating law is involved, conditions and formalities must be met or completed before the act is accorded legal recognition. In none of these instances is there any question of inflicting a penalty. An act is valid or invalid according to these prescriptions of law.

In discussing the eligibility of a monk to be elected an abbot, Pope Boniface VIII says definitely that the monk must be a professed religious before he can be elected.[35] The same monk, however, can be elected a bishop even before he has made his profession. Again, in discussing the election of an abbot to the episcopate, the Pope approves of such an election, but insists that the permission of the Apostolic See or its delegate be obtained before the abbot can occupy his see.[36] Regarding the effect of a papal reservation of a benefice, the Pope is careful to point out that any election which may have preceded the reservation is valid but every election after the reservation is invalid.[37] Boniface VIII discusses all these points in the decretals mentioned, but never is there a sign of invalidating an election as a penalty for the infraction of the law. It is rather the non-fulfillment of the conditions of the law, or the lack of necessary qualities, which vitiates an act. According to Pope Boniface VIII, the invalidity of an act does not depend on crime or on fraud. The words of the Pontiff which, taken alone, seem to indicate the penal nature of an invalidating law in the case of the religious who consented to his election without the permission of his superior, should be considered in this light.

There is, of course, no lack in the decretals of instances in which a person is deprived of rights he had legitimately acquired.[38] But in every instance a valid act is presupposed, and the penalty is imposed because of abuse of a right. One instance might well be examined to show that as long as the proper formalities are observed no invalidity attaches to the act; but where an abuse exists — for instance, in assuming power before it is actually conferred — a penalty will be inflicted. The law to be examined was enacted in the second general Council of Lyons.[39]

According to this law, if a bishop began to administer his diocese before his election was confirmed, he was punished with the loss of the rights he had obtained through election. This was a penalty imposed for the non-authorized assumption of authority. By election alone the bishop had not yet obtained the imme-

diate rule of his diocese. Until confirmation was obtained, he was without power to rule. Consequently, his intrusion into the administration of the diocese, either personally or by proxy, was an unwarranted act which deserved punishment. The second Council of Lyons punished such an act with the privation of any right which the bishop might have obtained through his election. The Council was careful to point out that it included in its condemnation any attempt on the part of the bishop to consider himself, before the confirmation of his election, as the administrator of the diocese. This was characterized as blind avarice and calculated fraud.[40]

In this law of the second general Council of Lyons, despite the severe penalties for the unauthorized use of authority or for the employment of fraud, not a word is said about the validity of the election itself. It is presupposed a valid election.

It cannot, then, be insisted too strongly that an act may be valid but invalidity may attach to certain further acts performed on the alleged force of this valid act. Such invalidity may even be a punishment which might extend to the actual privation of rights obtained through a valid act. All the operations of law must be studied and kept in proper order. Confusion will result from any disorder of approach to the way in which acts are to be performed. Every right which is conceded by law must be judged according to that law. Abuses are liable to punishment, as is indicated by the example of the law of the second Council of Lyons.

While the canonists who maintained the penal nature of invalidating laws appealed to the decretals for support, their basic reasons are found in Roman law. A few words must be said here about the texts which are offered. Although these texts are Roman law and need not necessarily have the same force either in the history or in the development of canon law, some principles of law are indicated and applied in them. Considering the great influence of Roman law on the development of canon law, it is not surprising that concepts of the former could and would be transferred to the latter.

The fundamental text in Roman law upon which the penal nature of invalidating laws is said to be founded, is a law of the Emperor Theodosius II.[41] It enunciates the principle that verbal compliance with the law is not sufficient, but that the spirit of the law must likewise be followed.[42] Theodosius says there is no doubt that an offense against the law occurs if the text of the law is observed but its spirit broken; therefore, the same penalties are incurred when only the spirit of the law is broken through fraud.[43]

Theodosius II was led to make this enactment because of abuse of the text of the law. There is little doubt that the purpose is to punish fraud, and the disabilities resulting from infraction are penal in nature. But it must be remembered that the occasion of the law was a particular abuse; and, insofar as it controlled this abuse, it was a penal law.

However, the Emperor did not stop with a law controlling a particular abuse. He declared every agreement and every contract contrary to the law invalid.[44] And this broad principle was extended even further, to include all interpretations of new and old law so that the prohibition of an act was sufficient to annul it if the act had actually existed.[45]

The law of Theodosius II is, in origin, penal, and there is a valid reason for saying that he meant the whole enactment to be equally understood as a penal measure. After his statement that neglect of the spirit of the law is as reprehensible as non-compliance with the text of the law, Theodosius II explains what led to the enactment of a general invalidating law. He can well be understood as punishing any infraction of his law on contracts, etc., with the penalty of invalidity.

But is the law of Theodosius II sufficient to show that an invalidating law is necessarily penal? Reflection shows that it will not support this necessity. It is true that he does extend a penal law, enacted for the purpose of suppressing abuse, to every agreement or contract contrary to the law. But this general law can well be a preventive measure to forestall fraud. Undoubtedly,

general laws which guard against fraud are founded on a particular instance of fraud, and the law intends to protect the citizen from a repetition of such instances. Thus formalities and solemnities are introduced as necessary safeguards. These safeguards, then, become means whereby the legislator can protect the common good; they become directive measures and are not necessarily penal, for even ignorant disobedience of the law involves invalidity of the act. This seems to be the force of the law of Theodosius II, for he declares every agreement or contract contrary to the law invalid. No exception is made for agreements or contracts drawn up contrary to the law but in good faith.

While this explanation of the law of Theodosius II may be satisfactory, the law itself must not be used to show the nonpenal nature of invalidating laws. It would be improper to isolate it for this purpose. The law is too closely bound up in the circumstances in which it arose to be separated and judged entirely as an independent item.

A law of Justinian is likewise urged as basis for the contention that invalidating laws are penal laws. The text of this law repeats that of Theodosius II almost word for word, except for the part wherein Theodosius explains the reasons that led to the enactment.[46] Hence, the text of Justinian is a statement of the principle that the spirit of the law cannot be neglected while the letter is observed; the violation of one bespeaks the same penalties as the violation of the other. The same extension of invalidity to all agreements and contracts is made; likewise, the extension of invalidity in the interpretations of old and new law. In other words, Justinian cut away all connection with the suppression of an abuse in a particular case and enacted his law to cover all violations of the law on contracts. This operation is important because the law can be studied without the constant fear that an actual abuse was its immediate cause or occasion. Such fear would naturally, as in the case of the law of Theodosius II, cast some doubt on the accuracy of one's interpretation.

But does Justinian's law serve better to prove the penal nature of invalidating laws?

It is difficult to see that it must be so interpreted. There is nothing in the text of Justinian's law which necessarily demands such interpretation. On the contrary, the more reasonable interpretation, since Justinian himself dissociated his law from the infliction of a particular penalty, would be to maintain that the law applied to all cases of violation whether actual fraud existed or not.

The same remark can be made here as was made in regard to the law of Theodosius. Undoubtedly, the law of Justinian was enacted to avoid and obviate fraud, but as it is worded, no actual fraud need exist for an act to be invalid. All that is required for invalidity to follow is for the act to be performed contrary to the law. Such contrary acts could be done in good faith where ignorance of the law supervened and prevented compliance with the law. Thus, the law of Justinian is an example of an ordinance which regulates the common good of the State. There is no necessity for interpreting this law as being penal in nature.

In a word, then, neither the law of Theodosius II nor the law of Justinian can be shown as necessarily indicating the penal nature of invalidating laws. The law of Justinian is even less liable to such interpretation. These laws, however, do directly contradict the force of an invalidating law in canon law, as will be demonstrated in the chapter on the interpretation of invalidating laws.[47]

Suárez,[48] in discussing the opinions of earlier canonists regarding the nature of invalidating laws, clearly and definitely distinguishes invalidating laws which are penal in nature from those which are in no sense penal. To take the latter first, Suárez says[49] that laws which demand a certain form for an act are not penal. Neither are laws which prohibit an act with an invalidating clause for the sake of the public good. To such laws for the public good, Suárez adds laws which are enacted for the conservation of the private good.[50] He cites a contract of marriage be-

tween near relatives as antagonistic to the common good, and the restriction placed upon the religious profession of minors as promoting the private good. These are good examples. Consanguineous marriage is a detriment to the public good, and only in certain cases should it be permitted. On the other hand, the religious profession of minors would only indirectly affect the public good; its restriction is primarily a protection for minors. The law intends that a well-considered judgment be had before one definitely and finally enters a religious community. The inexperience of youth is scarcely likely to produce such a judgment, and hence profession is forbidden to minors.

Further, Suárez[51] admits that invalidating laws can have a penal aspect. This occurs when the invalidity of an act is imposed because of crime. The example he uses is that of marriage between the adulterous. Such a marriage is invalid, and its invalidity is a punishment for crime.

Suárez[52] makes a further statement which is worthy of repetition. It is one thing, he says, to maintain that invalidity is a penalty, and quite another thing to say that the invalidity of an act, or in other words, an invalid act, is punished with a penalty. Conceivably the legislator could punish invalid acts by imposing a penalty. The legislator can reasonably expect a compliance with his law, and anyone who disobeys it is liable to punishment. If, then, a person deliberately produces an invalid act, he is subject to punishment. This is a legitimate exercise of coactive power. The punishment would result from the infraction of the law. Obviously, a penalty of this kind is something superadded to the idea of an invalidating law.

According to Suárez, then, invalidating laws are not necessarily penal laws. He admits the possibility of the simultaneous existence of invalidity and penalty, but these would be exceptional cases, and the two ideas are only materially joined; there is coalescence in fact but not in theory. Outside of these exceptional cases, when a penalty is imposed in an invalidating law it is accidental, and in no way affects the nature of such a law.

The doctrine of Suárez regarding the separation of the invalidity of an act and the imposition of a penalty is amply justified in the decretals. To take examples on the alienation of the property of the Church:[53] In the fourth Council of Lyons it was determined that church property could not be alienated. Infractions of this law fell under the force of an invalidating clause;[54] but in addition to the operation of the invalidating law, punishments were decreed. Pope Symmachus issued a similar law, which imposed similar penalties.[55] Pope Paul II was equally concerned with the inviolability of church property, and his decretal *Ambitiosae*[56] forbade alienation of that property without the consent of the Holy See, and punished infractions severely.[57]

The doctrine of Suárez is equally clear and definite in determining the dual manner in which an invalidating law operates. From this determination, Suárez shows that the principal effect of an invalidating law is not to punish but to conserve the public good. It will be interesting to follow his statement.

There are two ways, he declares,[58] in which an invalidating law operates. The first way is by directly ordering that an act be performed in a definite way and thereby forbidding other modes of action and invalidating them.[59] The general example given by Suárez is a law which demands that an act be performed in a definite way and which invalidates an act that does not conform. The specific example given is the law of the Council of Trent in regard to the form of marriage.

The second way in which an act is declared invalid is by prohibiting the act with a clause which clearly indicates invalidity.[60] Suárez gives various examples, e. g., marriage between near relatives, etc.

This second way of declaring an act invalid approaches the more modern and accepted concept of a law which declares a person incompetent to act legally. In fact, Suárez records this as a third way of declaring acts invalid. He attributes this to theologians. He himself does not so enumerate it, not because it is untrue but because it is contained in the twofold division he has

already outlined. Hence, Suárez in no sense denies that legal incapacities attach to certain persons, e. g., clerics in sacred orders; but he thinks that such incapacity is envisaged when the act is forbidden.

The above outline of the doctrine of Suárez shows that there is no necessary connection between invalidating laws and penalties. Suárez determines the nature of invalidating laws by observing their operation. From the different ways in which they do operate no indication is given that a penalty is involved. Penalties can be added to the violation of these laws in the same way that there can be sanctions for the violation of any other law.

Sanchez considers briefly the possible penal nature of invalidating laws.[61] His treatment of the question is in no way as exhaustive as that of Suárez. However, he commendably marks the weight of authority on the side of the onerous and not the penal nature of invalidating laws. Sanchez's own opinion is that an invalidating law is not penal in nature but is an onerous law. Before he discusses this opinion, however, he notes the possibility of founding the opposite opinion on a statement made by St. Augustine.[62]

In his definition of a penalty, St. Augustine calls it an injury (*laesio*) which punishes an evil action.[63] Sanchez accepts this idea, and says in effect that, insofar as it is true, an invalidating law is penal. Thus, Sanchez, relying on his interpretation of St. Augustine's words, can be cited as maintaining that some invalidating laws are penal. This position agrees with the doctrine of Suárez.

However, it is doubtful whether the authority of St. Augustine can really be cited as supporting the penal nature of invalidating laws. St. Augustine is speaking of the theological concept of penance, and his incidental definition of a penalty is very closely united with that concept. He is not speaking of the juridical force of penalties, nor is he concerned with whether a penalty can be attached to the infraction of a law. His words introducing the definition — *"Poenitere enim est poenam tenere, ut semper puniat in se ulciscendo quod commisit peccando"* —

must be considered as controlling his idea of a penalty; and they eliminate all juridical implications, since the penalty here is self-inflicted. Such punishments are clearly contemplated in theology and could be spoken of as penances, but they would scarcely be known in law. A penalty of law is inflicted by a superior either directly in the operation of the law or through the ministry of a judge. No self-inflicted punishments are contemplated in law.

Further, in the last sentence of the complete citation in the decree of Gratian, St. Augustine seems to consider penance and a penalty as being the same thing[64] — an identification proper in theology, but not in law. For even though, in accepting the penalty legally imposed by another, a person may show penitence and thereby be practicing penance, he cannot be said to be practicing a penalty. For these reasons, it is maintained that St. Augustine's definition of a penalty cannot be urged for the penal nature of invalidating laws.

As was mentioned earlier, Sanchez gives a long list of writers who support the non-penal nature of invalidating laws.[65] Some of the same writers are quoted by Suárez[66] in favor of the opposite thesis. There may of course be inconsistencies in these works, but the correct explanation of the writers' apparent indecision is probably found in the specific types of invalidating law treated. Decius, for instance, who is said by Suárez to maintain that invalidity resulting from law is a natural and intrinsic penalty, is also cited by Sanchez to support the non-penal nature of invalidating laws regarding the alienation of church property. Decius might well have held both opinions, for it is certain that some invalidating laws are penalties for crime, e. g., uxoricide, while other invalidating laws are clearly not the result of crime.

Sanchez, however, did see some inconsistency in the opinions of Decius, for while he is cited by Sanchez to support the non-penal nature of invalidating laws regarding the alienation of church property, he is also cited by Sanchez as maintaining that an invalid act resulting from the lack of proper formalities is a penalty. Both opinions could not be held simultaneously. If, as men-

tioned in the preceding paragraph, Decius held that some invalidating laws are penal in nature and at the same time held that the laws on alienation are not penal, there would be no inconsistency in his opinions. But if he held that laws on alienation are not penal and yet that the invalidity resulting from the noncompliance with these laws is a penalty, Sanchez correctly says that his opinions are inconsistent.

The opinions of Decius, however, are not similarly criticized by Suárez. Suárez does mention that Decius' doctrine is in favor of the penal nature of invalidating laws,[67] but he later cites Decius as the best author expressing the opinion that the idea of a penalty does not necessarily enter into the concept of invalidity resulting from the infraction of law.[68]

Conciliation of the views of Decius as stated by Sanchez and Suárez must remain doubtful. But the probable judgment on these views will be arrived at by maintaining that Decius saw invalidity as a penalty in certain laws but not in all invalidating laws. Admittedly, his position on invalidity resulting from the non-fulfillment of required formalities is difficult to explain. He may have considered deliberate neglect of these formalities as worthy of punishment, and so formulated his opinion.

Reiffenstuel[69] in his treatise on the Rules of Law of Pope Boniface VIII, does not even consider the possibility that invalidity and penalty may be identified. Reiffenstuel's doctrine is clearly set forth in regard to the necessity of observing certain forms and formalities. He cites the pertinent decretals controlling the alienation of church property and the making of testaments. Of legislation more closely united to his own time, Reiffenstuel proposes the example of the Tridentine form of marriage.

Had Reiffenstuel entertained any thought of the penal nature of an invalidating law, he could very properly have discussed this idea in his treatise on the Rules of Law. Rule 64[70] establishes a rule of law that is a restatement of the Roman law of Justinian, who borrowed it from Theodosius.[71] This rule in the course of time underwent milder interpretation, but in its source at least

it had a rigid application. Yet nowhere in his discussion of Rule 64 does Reiffenstuel treat the penal nature of an invalidating law, although he knew that Theodosius had originally enacted his law in penalty of a crime.

Nor, in his treatise on the existence, obligation and effect of an invalidating law, does Reiffenstuel even consider its possible penal nature.[72] Valuable commentary is found in this treatise, which will more properly be considered later when the obligation and interpretation of an invalidating law are discussed. Here, too, Reiffenstuel could have expressed his opinion regarding the possible penal nature of an invalidating law. But all he says is that the power to establish an invalidating law is necessary for the good of the community. He does mention that an invalidating law is an aid to checking the misdeeds of the malicious, but always the principal idea is the advantage of good government.[73]

Another opportunity which Reiffenstuel might have used to affirm the possible penal nature of an invalidating law is found in his treatise on the alienation of church property. He dwells at length on the concept and origin of alienation; he discusses the solemnities involved and the invalidity of contrary acts; he also mentions the penalties for disobeying the law.[74] But he does not advert to the nature of the laws on alienation.

The authority, then, of Reiffenstuel, even though he does not specifically consider the point, must be quoted against the opinion of those who maintain the penal nature of invalidating laws. Both from the reason which he offers for the enactment of invalidating laws and from the examples he uses to expound these laws, Reiffenstuel's opinion can be deduced: invalidating laws are not penal; they are laws for the common good of the community.

The argument for the non-penal nature of invalidating laws is based on the necessity for the existence of a crime before a penalty can be imposed. This is nothing new in the development of law, for the proper and actual infliction of a penalty is inconceivable without a previous punishable act. There is no reason

for denying that, occasionally, punishments are inflicted unjustly and without previous crime, but this befalls through error or malice; it is not part of the normal administration of either the Church or the State. Penalties are vindications of the right of society to protect itself and the interests of its members. They are useful means adopted to enforce the regulations ensuring the social welfare. Without sanctions it is difficult to enforce the law, since some members of society are lax in co-operating toward the common good, while others are positively harmful to the State or the Church. Hence, to protect and advance the common welfare, both the civil and the ecclesiastical authorities use penalties.

A penalty, then, is something usually added to a law. Of itself a law binds the citizens, but penalty for infraction of the law frequently aids its observance. The real concept of a penalty must, then, be clearly distinguished from the law it sanctions. It is not the hardship which results from an invalid act that constitutes a penalty. Such hardship is the self-inflicted inconvenience arising from the non-compliance with the law. A penalty is more than this. It presupposes bad will and a reluctance to obey the law, which reluctance the legislator considers sufficient for the exercise of his coactive powers. The bond of co-operation essential to society has been deliberately broken; this violence must be punished, as a corrective measure and also to stigmatize such lack of co-operation as anti-social. The members of a society freely accept their responsibilities to it and can reasonably be expected to discharge their duties. Whenever there is a refusal to obey a law, the society is threatened, and to protect itself it must try to change refusal to obey into actual obedience. Penalties are the means for accomplishing this end.

With this idea of a penalty in mind, it is evident that an invalidating law can be a penalty. But it is equally evident that an invalidating law need not be a penalty. Insofar as the invalidity of an act is a penalty, it can be justified by the same fundamental reasons which support the application of any other

penalty. Thus, if the Church forbids marriage to a person who brings about the death of his or her partner in marriage,[75] it does so because the crime itself deserves punishment. Yet it is not the repression and punishment of actual crime which constitute the duty of the government of a society. The authority of any society has far more duties than exercising coactive power. There is common decency to observe; particular states of life to surround with protection; and the ever-present need of checking any fraud which might injure the welfare of the society or its members. These duties are important and demand the utmost consideration. To discharge them, the legislator will enact invalidating laws whereby an act will not be recognized as legitimate, or whereby persons will not be recognized as able to act legally. In none of these instances would any actual crime be involved. There is, of course, the fear of the loss of decency or protection, and the fear of fraud, all of which will influence the legislator in enacting invalidating laws. But the point insisted upon is that no actual crime is committed. Therefore, an invalidating law has no necessary connection with actual crime.

In addition to Suárez[76] and Sanchez,[77] other canonists can be cited who clearly taught that an invalidating law is directive and not necessarily penal. Some of these authors will be examined. Their doctrine constitutes the common opinion today. Together with the examination of this doctrine it will be interesting to see what was the judgment of some authors who merely indicated their opinion without expressly formulating reasons for it.

Gibalinus[78] considers invalidating laws as restrictive laws.[79] He does not directly discuss the nature of invalidating laws, but he does consider penal laws as a different species. Both invalidating laws and penal laws are regarded as being subject to restrictive interpretation. Both species of law are included in the category of odious laws (*odiosae leges*).

Peckius[80] is more explicit in his treatment of invalidating laws. His discussion, found in his commentary on the Rules of Law of Pope Boniface VIII, is centered more on the validity of

an act contrary to the law than on the nature of invalidating law. But in his explanation of Rule 64, Peckius says that the penalty of nullity is not, properly speaking, a penalty because it does not cause the loss of any patrimony nor the loss of any acquired rights.[81] In this way Peckius excludes the concept of a penalty as one of the necessary elements of an invalidating law.

Altimarus[82] speaks of invalidity as resulting from the infraction of law. His statement is based on the law of Justinian.[83] While Altimarus may be cited as supporting the non-penal nature of invalidating laws, his statement must be considered with his idea of the purpose of laws which actually invalidate. According to him, the purpose of such laws is to penalize the transgressor.[84] Hence, while in one place Altimarus leans toward the onerous but not penal nature of invalidating laws, his doctrine is not entirely clear.

Covarruvias[85] likewise leans toward the non-penal nature of invalidating laws. His opinion is deduced from the various examples he discusses, most of which consider testaments and codicils. In such dispositions, several formalities must be fulfilled, and if these are neglected the instrument is invalid. Other formalities which may constitute further protection for the testator are not necessary for validity if the law does not require them.[86]

There is a statement, however, in the work of Covarruvias which clearly affirms the inefficacy of the testator's wishes if they are not made according to law. Covarruvias is speaking of civil law, but the principle is equally applicable to canon law. He says: "*Per leges civiles non potest quis sine solemnitate iuris testari, cum ab eo potentia auferatur. Colligitur ergo parum eius voluntatem prodesse, quantumcumque ea manifesta sit.*"[87] This statement definitely places at least those laws which demand formalities as laws which are not penal. The testator enjoys no power to make his testament except as the law provides. There is no punishment involved. All that happens is that the illegal testament is not recognized as valid.

Leurenius' opinion[88] is as definite as the doctrine of Suárez and Sanchez. Invalidity, he says, is an apt penalty for crime, e. g., uxoricide, adultery, simony, but that invalidity must not be considered penal, for in some cases it is really a favorable item. This latter statement is better constructed than the opinions of Suárez and Sanchez.[89] Leurenius recognized that some hardship might result from the application of invalidating laws, but he considered such hardship as incidental and in no way destructive of the favorable aspect of invalidating laws. He realized that the public good is the first duty of government, and that for its protection and advancement invalidating laws may be necessary. His argument, therefore, is founded on the just rule of society where some sacrifice of rights could legitimately be demanded. Such sacrifice is not penal; it may be onerous at times to individuals, but the law which demands it is favorable to society. This aspect is reflected in the protection granted to the members of society.

Wernz[90] considers invalidating laws in his discussion of the effects of law, and definitely states that an invalidating law is not essentially penal. Probably Wernz did not feel that a lengthy explanation should be made to prove this point, for instead he discourses rather at length on the effects of an invalidating law. There is much to learn from Wernz's discussion of these effects, but the matter can best be studied in the interpretation of invalidating laws. Here it will be sufficient to note that Wernz considers a penal invalidating law as inoperative if the crime which it intends to punish is in fact non-existent. Wernz is not so certain that ignorance alone of the penalty of invalidity will prevent the operation of the law.

Wernz, in admitting the existence of penal invalidating laws, cites the decretals of Pope Gregory IX.[91] These were laws punishing the crimes of uxoricide and adultery. Wernz further cites as support for the existence of penal invalidating laws the decretals of Pope Boniface VIII,[92] which invalidated the election of a religious who had consented to his election without the permission of his Superior. This decretal was examined in detail earlier

in this chapter and found to be a poor support for the penal nature of invalidating laws. If the examination is correct, the decretal can scarcely be cited for the actual existence of penal invalidating laws, because it was rather an insistence on the observance of a formality which had been neglected that led Pope Boniface VIII to issue his decretal.

De Angelis[93] clearly differentiates penal from prohibitory laws. A subdivision of the latter includes invalidating laws. Such division and subdivision are enough to show De Angelis' opinion regarding the nature of invalidating laws. There is, however, in his commentary on the decretals, a discussion of the retroactivity of laws wherein the subject of invalidating laws is twice considered.[94] He says first that an act completed in the past cannot be matter for a prescriptive law or for a law which merely prohibits an act; but that such an act can be matter for an invalidating law. He arrives at this conclusion from a comparison with the effect of a law which permits a judge to invalidate an act. This comparison is not strictly conclusive, for the invalidity pronounced in court is not necessarily operative before the sentence is issued. If all laws which eventually result in the invalidity of acts were equally onerous, De Angelis' conclusion could be readily adopted. But, as we shall see when the division of invalidating laws is discussed, all so-called invalidating laws are not immediately operative, and some distinction must be introduced to indicate the time when an invalidating law does operate. Yet, if understood properly, the basis for De Angelis' conclusion that invalidating laws are not necessarily penal in nature can be used. Certainly, as he says, if the sentence of a judge can invalidate an act performed in the past, a law subsequent to the act can produce the same effect.

Later[95] De Angelis discusses the legal incompetence constituted by a law. He affirms that such legal incompetence to act can be retroactive, whereas no penalty can be proposed and inflicted for past acts. He finds this a clear indication that legal incompetence to act is not, strictly speaking, a penalty.[96] The reason

assigned for this statement is that such incompetence does not deprive one of rights already acquired. Moreover, such incompetence is necessary for the common good.

It will be remembered, of course, that De Angelis is speaking directly of the retroactivity of laws. Only indirectly is he discussing the nature of invalidating laws. Yet, from the standpoint of possible retroactivity, he shows clearly that an invalidating law is not necessarily of penal nature. His example of legal incompetence to act is an excellent one. If any criticism can be made of it as showing that an invalidating law is not necessarily penal, it would lie in the fact that such incompetence is particularized by some authors,[97] and assigned as a penalty for crime. Such criticism, however, should not be pressed too far, as no one denies that invalidity of an act can be a penalty. The only question is whether it is necessarily so. De Angelis can be cited as maintaining the non-penal nature of invalidating laws.

In concluding this chapter on the concept of invalidating laws, it is necessary to indicate that certain other laws resemble invalidating laws in producing the same ultimate effect. These laws restore the original status of persons who have petitioned a judge for a rescissory judgment.[98] These laws must be carefully distinguished from invalidating laws. Normally the former presuppose a valid act and operate either on plea of a petitioner or officially by the personal intervention of the judge himself.[99] While a discussion of these laws would be profitable and could again set forth the nature of laws which actually invalidate, such discussion, because of its length, would be beyond the scope of the matter at hand. Some remarks, however, are made in subsequent pages whenever a particular instance can be briefly discussed. Zallinger's remark should be kept in mind: that when a law demands that an act be declared invalid, it does not follow that this act was valid in natural law.[100] Thus, when a law orders an act to be rescinded, this act could have been already invalid in natural law, or it could have been valid but for reasons of the common good be actually and at the moment rescinded, so that

the effects of this valid act would disappear. Normally the latter action is proper to rescissory judgments.[101] An act already invalid in natural law would scarcely be subject to a rescissory judgment. It could, however, as Zallinger says, be publicly, judicially and authentically declared null and void.

## Chapter II

# THE DIVISION OF INVALIDATING LAWS

INVALIDATING laws are variously classified.[1] As was shown in the preceding chapter, an invalidating law is primarily an instrument for the protection of the common good. A secondary purpose is sometimes added: namely, punishment for crime. Thus invalidating laws could be divided into *invalidating* laws and *invalidating-penal* laws. Such a division is in fact part of the complete classification of invalidating laws offered by Michiels.[2]

Again, invalidating laws might be considered from the standpoint of obligation. The effect of these laws could be weighed and their binding power in both the external forum and the internal forum determined. Thus, as Maroto indicates,[3] an invalidating law may be moral (*lex irritans moralis*) or civil (*lex irritans civilis*). The former would deny validity to any contrary act even in the internal forum; the latter would consider such invalidity only in the external forum.

There are other divisions, but these are cited as indicating how multiplex a complete classification must be.[4] Classifications of invalidating laws offered by modern canonists do not entirely agree with those made by earlier writers. During the course of time the subject has been thoroughly studied, and there have resulted complete divisions that contain more parts than were formerly supposed necessary. In order to study the classification of invalidating laws properly, it is imperative to set forth the divisions made by canonists both before and after the promulgation of the Code of Canon Law. Emphasis will be placed on the classifications offered by canonists after the Code, but several representative authors before the Code will also be studied.

Reiffenstuel[5] cites two divisions. (1) A law can invalidate an act either of itself (*ipso iure*) or by means of a judicial sentence. Reiffenstuel claims that this is common doctrine. The first possibility — a law invalidating *ipso iure* — is exemplified by diriment matrimonial impediments. The operation of an invalidating law of this kind is immediate. It does not require any declaration before it produces its effect. In the second case — where a law invalidates by means of a judicial sentence — a decision of a court is necessary before an act may be declared invalid. In this group Reiffenstuel includes contracts of sale where considerable deception was practiced and also contracts entered into through grave, unjust fear.

(2) A law can invalidate an act either explicitly or implicitly. Reiffenstuel claims this, too, to be common doctrine. An invalidating law which acts explicitly operates with clear-cut words and phrases. Examples adduced are: *"Si secus fiat, omni careat robore firmitatis; irritum sit et inane."* Implicit operation of an invalidating law occurs through equivalent words. Reiffenstuel does not consider this to mean that such a law must contain expressly or clearly invalidating words but, rather, that it establishes and requires certain forms, formalities or solemnities before an act can be valid. An example which he gives will clarify his statement. The example — a favorite among canonists — is taken from the legislation of the Council of Trent in regard to the celebration of marriage. In Session XXIV the Council of Trent decreed that marriage would be invalid without the presence of the pastor or of a priest assisting with the permission of the pastor or the Ordinary. Thus was established a formality which the Council insisted upon. Matrimonial contracts entered into contrary to the law and neglecting this formality would be null and void.[6]

Reiffenstuel makes no further divisions of invalidating laws. His explanation of these laws, however, considers particulars in the discussion of which he could readily have introduced subdivisions. These explanations of Reiffenstuel can more properly

be studied later, in the chapter on the interpretation of invalidating laws.[7]

Reiffenstuel's classifications, while intelligible, are not entirely acceptable. Some remarks should be made about them.

In the first division confusion can arise from the statement that a judge can, as Reiffenstuel says, declare an act invalid. Does Reiffenstuel mean that a judge could rescind a valid act and restore the aggrieved party to his original status? It would seem that this was really Reiffenstuel's opinion, for he gives equity as a reason for acts being rescinded by a judge. Moreover, the examples alleged by Reiffenstuel concern fear — unjustly produced, it is true. It is difficult to believe that Reiffenstuel could confuse an act invalid by law with one valid in law but rescindable, yet this confusion does exist. We call it *confusion* because if Reiffenstuel actually maintained that a rescindable act is an invalid act he would be wholly incorrect. The two acts are completely dissociated in law. Nevertheless, they are treated by Reiffenstuel under the same category in the divisions of invalidating laws.

Another comment on the classifications made by Reiffenstuel is more or less a word of caution. By implicit invalidation Reiffenstuel means that an act is not valid unless certain formalities set down by the law have been complied with. He speaks of *"irritatio implicita quae fit per verba aequivalentia."* Implicit invalidation is not mentioned in the Code of Canon Law, but the word *aequivalenter* is used in canon 11. This, however, does not mean implicit invalidation.

In spite of this, Reiffenstuel's concept of equivalent invalidation is still followed by some modern authors. Coronata, for instance, interprets *aequivalenter* in canon 11 as meaning invalidation resulting from the lack of necessary formalities or solemnities.[8] The same interpretation is made by Cance,[9] and by Cocchi.[10]

Pichler[11] divides invalidating laws in an only slightly different way. According to Pichler, invalidating laws either act of themselves, that is, by the very nature of the case (*ipso facto*);[12] or

they act indirectly by determining the inability of persons to act, by fixing solemnities of form, or by requiring that essential conditions be fulfilled. The second part of this division of invalidating laws agrees partially with the implicit invalidation taught by Reiffenstuel, but it also includes an inhabilitating clause as indirectly invalidating an act.

Without making his statement an actual subdivision of one of his classifications, Pichler asserts that if a judge declares an act null and void, the act itself was not invalid from the beginning. Penal invalidating laws are included in this statement, but such laws are not the only ones Pichler is considering.[13]

A word of caution should also be given in respect to Pichler's classification of invalidating laws. What Pichler understands by indirect invalidation is a combination of prohibitory laws and laws which demand that formalities be fulfilled. All this, of course, is in a sense indirect invalidation of an act because the principal item affected is always the act to be placed. Even when a person is said to be incompetent to act legally, it is his physical act which is declared invalid because of his legal incompetence. The same is true when formalities and conditions must be fulfilled. It is the act which is primarily under consideration. It is valid if it is according to the law; otherwise it is not valid.

According to this viewpoint, it would be incorrect to reject Pichler's division of invalidating laws. But criticism might be made on the plea that his classifications are not sufficiently clear. Hence confusion can arise. Pichler's classifications must be used carefully.

Zallinger's division of invalidating laws[14] contains the same terms that Pichler uses, but the laws included under each of the terms are not the same. Under the class of invalidating laws which act immediately and directly, Zallinger places a law which declares a person incompetent to act. He reserves the term "indirect invalidation" for laws which prescribe legal formalities or solemnities. In his divisions Zallinger clearly shows himself as holding that rescinding an act is not the same as declaring an

act null, for he places a judge's decision in an entirely separate category from the direct operation of an invalidating law; later, however,[15] he states that it is not valid to conclude that a decision rescinding an act, or declaring an act null, means that it had been a valid act according to the natural law. This is so, Zallinger says, because all that the law prescribes is that the act be publicly, juridically and authentically declared invalid. He means, then, that the act under discussion could have been valid or invalid, anterior to the judge's decision. This is true, but Zallinger should have, again — for the sake of clarity — distinguished, as he did in his text, between a law which orders a judge to declare an act invalid and a law which orders a judge to rescind a valid act. Zallinger also offers several rules for the interpretation of invalidating laws which will be examined later.[16]

Schmalzgrueber does not go into detail in considering invalidating laws;[17] it is unfortunate that he did not feel that a detailed classification of these laws would be useful. All that he does in his division of invalidating laws is to classify an invalidating law as one which invalidates an act. The example he uses is the Tridentine form of marriage. From this example it is clear that Schmalzgrueber at least holds that some formalities can be insisted upon in order to make an act valid. There is no suggestion that a law can invalidate an act through the subject's legal incompetence to act and no indication that a penal clause can be used as an invalidating factor. Obviously, Schmalzgrueber, otherwise so complete in detail, is unsatisfactory in his treatment of this matter.

Maroto, who published his commentary on the first book of the Code of Canon Law not long after the promulgation of the Code, gives a complete classification of invalidating laws. He seeks to divide these laws according to various viewpoints. We shall review these in detail.[18]

1. As regards the efficacy of a law, an invalidating law can be either moral (*moralis*) or civil (*civilis*). In a footnote Maroto warns that the latter word is a technical expression and is

not to be confused with a law enacted by some civil government or society. According to Maroto, an invalidating law is said to be *moral* when it deprives an act of the validity it would otherwise possess from the natural law. An invalidating law is said to be *civil,* on the contrary, when this natural efficacy is not impaired but the act is deprived of the force it would otherwise possess in the external forum. Maroto quickly gives a similar division which for practical purposes can be reduced to the division just described.[19]

2. Concerning the manner in which a law produces its effect, an invalidating law either operates *immediately,* or produces its effect *after* the decision of a judge. Maroto refers to invalidating laws as *irritatio ipso facto* and *irritatio ferenda.* He points out that the latter type does not concern itself with rescindable but valid acts.

3. In regard to the *liceity* of an act, an invalidating law *merely declares* an act null and void or a person incompetent to act, or at the same time *prohibits* this act. This is the distinction which Marto, with many others,[20] calls respectively *pure irritans* or *irritans-prohibens.*

4. If the purpose of a law be considered, an invalidating law *simply annuls* an act (*irritans simpliciter*), or it also *establishes* this *invalidity* of an act *as a penalty* (*irritans-poenalis*). Maroto cites as an example of the latter law the punishment meted out to a beneficiary who neglects to recite the Divine Office.[21]

5. Finally, Maroto also speaks of the way in which the annulment of an act is obtained. This is not entirely the same category as that described above under number 2. In this last division Maroto speaks of a direct, an indirect and an inhabilitating effect of an invalidating law. *Direct* invalidity follows from the law itself; *indirect* invalidity results from some defect of prescribed form; an *inhabilitating* effect is produced by declaring a person incompetent to act.

There is little criticism to offer of Maroto's classification of invalidating laws. For the most part it is clear and adequately

proposed. There is some confusion in the description of the *irritatio ferenda* and some consequent difficulty in understanding this item, but careful study will reveal that no contradiction exists. Maroto is following in the footsteps of earlier canonists — for example, Pichler.

Michiels[22] presents his divisions of invalidating laws in much the same manner as they were given by Maroto.

1. Michiels divides invalidating laws into those which produce their effect immediately and those which require the action of a judge. He describes these laws in a way which is usually reserved for the description of penalties. He says that invalidating laws are either *latae sententiae* or *ferendae sententiae.*

2. Further, Michiels divides invalidating laws according to the *degree* of their efficacy. Thus there are some invalidating laws which produce their effect only in the external forum, while others invalidate an act also in the internal forum. This classification is the same as that which Maroto considered in his division of *moral* and *civil* invalidating laws.

3. Again, Michiels classifies invalidating laws according to the *cause* or purpose for which they were enacted. This division is the same as that of Maroto.

4. Finally, Michiels considers liceity as a point of classification. In the treatment of this aspect also, his divisions are the same as Maroto's. In a footnote, however, Michiels says that it is useless to add a third item to this division (*lex irritans-praescribens*), because such a law can be reduced to a prohibitory invalidating law.

The divisions made by Michiels are generally satisfactory. There seems to be no valid reason, however, why the expressions *latae sententiae* and *ferendae sententiae* should be employed to describe the operation of invalidating laws. These terms are traditionally applied to penalties. To appropriate them for use in regard to laws that are not essentially penal can serve no beneficial purpose. Michiels' transference of the expression *latae sententiae* to describe the operation of invalidating law is not

inaccurate, but the use of this expression is liable to misunderstanding, as will be explained shortly.

Van Hove gives two methods of classifying invalidating laws.[23]

1. Considering the *manner* in which an invalidating law produces its effect, Van Hove says that there is a nullity *latae sententiae plenissima, latae sententiae* and *ferendae sententiae.* The first kind of invalidating law operates immediately; the second requires a declaration of a judge; the third is the result of a judge's condemnatory sentence.

2. In regard to the *efficacy* of an invalidating law, Van Hove adopts the division of Maroto and says that invalidating laws are *moral* or *civil.* Here Van Hove cites the actual text of Maroto.[24] His explanation is the same.

The same criticism raised above against the use of terms proper to penal legislation is equally applicable to Van Hove's classification of invalidating laws. Besides this general censure, there is the fact that Van Hove describes *nullitas ferendae sententiae* as a condemnatory sentence which invalidates an act. Now such a sentence is an altogether different thing from the judicial declaration applying the nullity contained in the law. Although Van Hove says that a rescindable act is entirely different from an invalid act, he does not account for this difference in making his divisions. On the contrary, one is led to believe that rescindable acts and invalid acts are the same. Further, Van Hove's use of the expression *latae sententiae* is not accurate. If this expression is employed in the sense in which it is used in penal law, it means that an invalidating clause is invoked before a judge's declaratory sentence. A penalty *latae sententiae* is always incurred at once. A judge's declaratory sentence merely publicizes this penalty. But Van Hove states that a law which has a clause *nullitas latae sententiae* needs a judge's decision *before* it can operate. There is, then, this unnecessary confusion resulting from the transference of expressions from penal law to laws which are

not necessarily penal. For these reasons Van Hove's classification is unsatisfactory.

Coronata gives several divisions of invalidating laws.[25] They are: (1) *civil* or *moral* invalidating laws; (2) *latae* or *ferendae sententiae;* (3) *poenalis* or *non-poenalis;* (4) *simpliciter irritans* or *irritans-prohibens.*

There is very little to be said of these divisions which has not already been mentioned. It must be noted, however, that Coronata carefully indicates that the invalidating law which he calls *ferendae sententiae* is not, strictly speaking, an invalidating law at all. In this way Coronata's division is to be preferred to Van Hove's. Both use the same expression, but Coronata practically admits that an invalidating law *ferendae sententiae* really ought not to be included in a division of such laws. It is necessary to know this because serious legal effects can follow from a judge's decision to annul an act. If an invalidating law contains a clause which operates not of itself but only after a judge has applied the law, the effect of such a decision will be retroactive. Van Hove admits this.[26] But if an act is valid yet rescindable, it does not necessarily follow that the judge's decision has retroactive force. In his description of invalidity *ferendae sententiae* Van Hove states that the effect is not retroactive. It would seem, then, that what has been called invalidity *ferendae sententiae* does not involve an invalid act at all; that the judge's decision is not based on an invalidating law but on one which gives him the right to decide upon a valid but rescindable act.

Cicognani gives but one set of divisions for invalidating laws.[27] This is the classifying of laws according to whether they invalidate an act but do not actually prohibit it (*irritant quin prohibeant*) or whether they both invalidate and prohibit (*prohibent et simul irritant*). As examples of the former, Cicognani cites the formalities required for the validity of testaments; and as examples of the latter he adduces diriment matrimonial impediments.

This division is satisfactory in the sense that all invalidating laws either do or do not also prohibit an act. If this point alone be kept in mind, emphasis will be placed on the moral obligation to refrain from acting contrary to the prohibition contained in certain invalidating laws. This is important in the forum of conscience. However, from the standpoint of considering the varied phases and operations of an invalidating law, one needs more detailed divisions.

Cocchi's divisions of invalidating laws are the same as those offered by Coronata.[28] Cocchi, however, does not approach the clarity attained by Coronata in describing an invalidating law *ferendae sententiae.* Coronata clearly and openly says that such a law is not strictly an invalidating law. Cocchi, on the other hand, approaches this topic indirectly by admitting that an act nullified under a law *ferendae sententiae* is an act which had been valid. This is nothing more than admitting that the act at issue is valid but rescindable. It is remarkable how authors stress the difference between an invalid act and a rescindable act and yet actually fail to keep this difference before them.

The divisions enumerated above will give a picture of the way in which, and the aspects under which, canonists both before and after the promulgation of the Code of Canon Law have considered invalidating laws. Other canonists have been content to indicate the existence of invalidating laws, supplying a word or two of explanation but in no way attempting to clarify the use of these laws. Augustine,[29] Falco,[30] Bareille[31] and Mothon,[32] for instance, merely quote canon 11 verbatim or paraphrase it. Cance[33] does little more. He does divide invalidating laws according to whether they have express or equivalent clauses, then proceeds to divide equivalent clauses into substantial and accidental clauses. According to Cance, a substantial clause or condition unfulfilled will invalidate an act. Haring[34] considers invalidating laws under the topic of laws according to "sanction." The examples he adduces are the solemnities required for an act to be valid and the inability of some persons to act legally.

It is freely admitted that the author's consideration of the canonists' classifications of invalidating laws has required perhaps more space than might be considered necessary. This thought has always been present, but at the risk of repetition it will be useful to comment on the concept of invalidating laws of earlier canonists. The final arriving at perfect divisions should aid toward a better grasp of the real meaning of invalidating laws. It is evident, then, that nothing should be present in the classifications which can possibly confuse or in any way render less clear the concept of invalidating laws that is obtained from their definition. We have had occasion to point out such possible confusion.

In the remarks made upon several of the divisions enumerated above, it was said that valid but rescindable acts were apparently classified under the general heading of invalidating laws. This classification is incorrect, for no act that has been valid can actually be declared null and void from inception. True, legal recognition will not be accorded such an act after the judge has given his decision to rescind it. It is likewise true that the effects of the judge's decision may be retroactive. But this latter is a fiction of law which ignores the constitutive elements of an act and considers them as actually non-existent. There is no quarrel with this fiction of law. It is necessary to use it at times, especially when the welfare of private persons is endangered.

It cannot be said, either, that a law which permits or even orders a judge to declare an act null and void is really an invalidating law. It is true that the application of such a law will result in invalidating an act, but this is in reality the cancellation of the legal effects of an act which canonists[35] consider to have been valid. The invalidity of the act itself then follows. Michiels tries to meet this difficulty by distinguishing between the various stages of the operation of the law.[36] He claims that at least in the first stage (*actu saltem primo*) invalidity is determined in the law because the law states that under certain circumstances an act is to be annulled or a person declared unable to act. Michiels

tries further to distinguish this law from one which merely permits rescindability of an act.[37] Michiels' attempt to distinguish the stages of an act in regard to a law which does not itself attach invalidity to an act but rather permits or even orders a judge to do so, is really an attempt to show that invalidity of an act can be demonstrated outside the direct and immediate operation of law. This is not to be denied or even challenged. But it can be asked whether such a law is really an invalidating law. It carries the power to invalidate, but it does not itself operate. This is contrary to the fundamental idea of an invalidating law. An invalidating law is one which itself attaches invalidity to an act or itself declares a person incompetent to act. This doctrine is clearly to be found in the definition of an invalidating law given by Michiels himself.[38] He says: "*Lex irritans ea dicitur, quae directe personarum actus ordinans, quosdam harum actus contra eius dispositionem positos, invalidos seu nullius valoris esse decernit, a quacumque persona peragatur.*" Similar direct and immediate inability to act legally is to be found in Michiels' definition of what is called *lex inhabilitans.* There can be no doubt that so far as the definition of an invalidating law is concerned, Michiels maintains that its operation is direct, immediate and sufficient. Only when he sets forth his divisions of invalidating laws does he also include acts that are valid before a judge's decision to annul them. This is inconsistent. But it is an inclusion that is also adopted by others among the canonists mentioned above.

Now that we have reviewed the classifications of invalidating laws offered by representative canonists both before and after the promulgation of the Code of Canon Law, and have rejected some of these divisions as unsuitable, it will be necessary to see what divisions can actually be retained or constructed anew.

Before outlining and explaining his own divisions of invalidating laws, the author finds it necessary to state again that his contention is that an invalidating law is one which itself will annul an act, or declare a person incompetent to act. This is the

essential point to consider. Everything else is an accretion of the law itself or an attempt to have the law operate in a manner other than is revealed by the concept of an invalidating law. It is admitted that laws exist which order a judge to invalidate an act or declare a person unable to act or unable to receive favorable recognition in law. Such a law, for instance, is to be found in canon 2346.[39] This law provides a penalty for all who convert ecclesiastical property to their own use, and clerics who do so are further punished by being declared unable to receive benefices. Another example can be found in canon 162, § 2. This law openly concedes that an election is valid even if one of the electors was not called to an election and therefore could not attend it. But it provides that this valid election can be annulled.[40] There is an injunction laid upon a Superior to invalidate the election in the event of willful neglect to summon a qualified elector.

It should be noticed that in both the examples adduced no real clause of invalidity or inability to act is found in the law itself. In both laws a subsequent judgment is required. As a penalty, or as a safeguard of honest elections, an inhabilitating or invalidating decision is made. These examples differ considerably from the example of direct and immediate invalidity of an act found in canon 116,[41] or from the instance of direct and immediate restriction placed on persons in canon 167, § 1.[42]

To show that the two cases cited above are not, properly speaking, examples of invalidating laws, it is sufficient merely to study the description of an invalidating law given in canon 11. There is no hesitancy in canon 11's identification of an invalidating law. The word *statuitur* clearly indicates that the invalidating clause must occur in the law itself and must operate through and by the law itself. This latter detail is admittedly not taught by all canonists after the promulgation of the Code of Canon Law nor is it foreshadowed in the doctrine of earlier canonists. But it seems to be the meaning of the canon, since no provision is made in the canon for subsequent judicial action. In applying canon 11, however, there is no intention to exclude a judicial

decision which merely states that an act is invalid, provided this statement or declaration does mean an act is invalid merely from that moment. The contention is that the act has always been invalid and that the judge's statement is merely a public and judicial recognition of that fact. To annul an act by judicial sentence, or even to make the effect of this sentence retroactive, is not an application of canon 11. As we have seen, such an annulment of an act is possible, but when it does occur, it is not the application of an invalidating law as understood in canon 11.

Now, what divisions of invalidating laws can be offered? There are several items to keep in mind: the application of the fundamental concept and the manner in which these invalidating laws are imposed and used. These will be considered separately.

To apply an invalidating law is to use it in one of the ways in which it can produce its effect. This effect can be produced either by establishing formalities, solemnities or conditions which must be fulfilled or met; or the effect can be produced by denying legal competence to act. Thus in the form of marriage established in canon 1094,[43] these formalities must be fulfilled or the contract of marriage is invalid. This means that legal and canonical recognition of this contract will not be accorded if canon 1094 is not fulfilled. The canon has nothing to do with the existence or non-existence of the natural constitutive elements of the act. Or, to take the second possibility, certain conditions — e. g., knowledge and freedom to act — may be required before an act can be valid. Thus if an office is renounced through the exercise of fraud against the office holder, the renunciation is invalid,[44] because knowledge and subsequent freedom to act are impaired.

Again, as is clearly legislated in canon 167, §1, 3°,[45] a valid ballot cannot be cast by one who has at least been declared to be under censure. This also is an application of an invalidating law because it restricts activity and will not accord legal and canonical recognition to a physical act. Therefore the fundamental division of invalidating laws concerns the way in which

an invalidating law produces its effect. There is no objection to calling the application of an invalidation *direct* if invalidation is immediately attached to the act itself, and *indirect* if it is mediately attached to the act and immediately to the person who attempts to place this act. After all, it is the act which is the primary consideration of an invalidating law. Since this fundamental division of invalidating laws is twofold, there are two ways in which the same effect can be produced. Thus there are two kinds of invalidating laws: *lex irritans,* which directly concerns the act performed; and *lex inhabilitans,* which directly concerns the person acting or attempting to act. But in the latter law, it is still the act that is the primary consideration.

Besides this fundamental division, there are other aspects of invalidating laws to consider. An invalidating law can annul an act *absolutely* as, for instance, in canon 1074, § 1,[46] or it can demand a formality — e. g., permission of the legitimate Superior — before the act becomes valid. In the latter case only *conditional* invalidity is imposed, as in canon 1530, § 1, 3°.[47]

Another aspect of invalidating laws to consider is the purpose for which the law is enacted. This purpose can be the common good, as in canon 157[48]; or it can be punishment established for certain crimes, as in canon 729.[49]

Still another aspect to be treated is the morality of the act involved. Thus an invalidating law may prohibit and annul an act, as in canon 132, § 1, and canon 1072;[50] or it may merely annul the act without forbidding its being attempted, as in canon 186.[51]

Finally, the extent of the obligation inherent in invalidating laws can furnish a point of division. Thus an invalidating law can bind in both *fora,* or it can bind only in the *external forum.* As far as laws of the Code are concerned, this is merely a theoretical division, for all canon law binds generally in both fora; but this division may have some importance in civil law, where a law may bind perhaps only in the external forum. The latter

possibility, however, is not to be presumed. The intention of the legislator is, of course, the controlling factor.[52]

These divisions partially agree with the divisions of invalidating laws as outlined in various commentators and partially disagree with them. It seems more important to divide as canon 11 indicates, showing the fundamental difference between the two kinds of invalidating laws, and then showing the subsidiary but useful divisions according to the different aspects of these laws, than to group all the divisions as if they were of equal importance. Thus, above, an attempt has been made to set forth first the fundamental division and only afterward to discuss the manner in which an invalidating law can be used, and the purpose and extent of its obligation.

## Chapter III

# THE POWER TO ENACT INVALIDATING LAWS

AS MENTIONED earlier,[1] there has never been any serious challenge of the general right of the legislator to enact invalidating laws. The need for such laws is so evident that the power necessary to enact them was never denied the legislator. Besides, there is almost unanimity among the canonists of earlier times and those of the present day in stating the reasons why invalidating laws are necessary. Reiffenstuel,[2] for instance, says that the power to enact invalidating laws is as necessary as any other power forbidding an action or obliging a subject. Here, he says, we have a potent means of obviating the activities of the malicious. This, according to Reiffenstuel, is necessary for the public good. Suárez[3] offers practically the same reasons. He proceeds to show how the common or public good is served by the use of invalidating laws. His demonstration is sound and it is worthy of repetition.

Suárez begins his demonstration by showing that there is no contradiction between natural liberty and the use of invalidating laws. Whatever liberty man has is subject to the society of which he is a member. Therefore the liberty to act can be controlled. That such control, even to the extent of invalidating acts, must at times be exercised is proved by experience. It is, then, the duty of the legislator to invalidate certain acts whenever there is fear of public harm. It is likewise the duty of the legislator to establish at times certain formalities which must be fulfilled before an act can be considered valid.

Suárez has no illusion that invalidating laws are not onerous. He admits inconvenience and freely concedes that such laws are a restriction.

The right of the Church to impose restrictions on the liberty of her subjects is best demonstrated in a discussion of the Tridentine form of marriage. In the Council of Trent a universal law, applicable where the law was promulgated, was enacted demanding at marriage the presence of the pastor and witnesses.[4] In the discussion leading to this enactment it was suggested that a person's natural right to marry would be unduly curtailed if the formalities were so stipulated as to render a marriage invalid without them.[5] It was also suggested that the power to invalidate clandestine consent was theologically impossible. It will be useful to examine the reasons alleged why the Church could not invalidate acts. This examination will throw light on what fundamental power the Church possesses over the actions of her subjects and will show how the relationship between the Church and the faithful should be considered.

The first argument proposed against the use of invalidating laws in regard to the form of marriage maintained that marriage is a natural contract where even clandestine consent sufficed. That such consent did suffice before the legislative action of the Council of Trent was freely admitted by the Council itself, although clandestine marriages had been disapproved. Since clandestine consent had been sufficient, it was argued that nothing more could be required for the validity of marriage. No solemnity or formality could be demanded by the enactment of an invalidating clause. Any attempt to attach such a clause to the natural marriage contract would involve an alteration of natural law, it was contended.

The reply to this argument demands a distinction between various precepts of natural law. Some precepts of natural law command, and others permit. That the Church has no power to forbid an act commanded by natural law is conceded; but the Church does have power to restrict an act which would only be permitted, not commanded, by natural law. It is certainly true that a clandestine marriage is permitted by natural law, but it is equally true that such a marriage is not commanded by natural

law. Many rights are fundamentally supported by natural law which are seldom or never exercised because of the social restrictions of society. These rights could be exercised except for the restrictions of positive law. Yet no injustice is inflicted on a person who must, in order to live in society, surrender some rights which he could, if he lived outside of society, exercise.[6]

Clandestine marriage is unquestionably something permitted by natural law. Fundamentally mutual consent to marriage is sufficient. But, since marriage is a contract, it involves certain relationships which are founded on natural law but are regulated by positive law. Such regulations are exemplified in the Tridentine form of marriage. In a word, then, since a clandestine marriage is not commanded but only permitted by natural law, it can be declared invalid by an authority authorized to regulate the acts of its subjects.

The right of the Church to invalidate the natural consent of marriage is at least parallel to the right of the State to invalidate contracts entered into without due solemnities.

The State considers itself competent to declare certain acts of purchase and sale invalid. It feels the same competence in promulgating the law requiring solemnities for the making of valid instruments. No one will deny the State the right to control and regulate the actions of its citizens, even though such control and regulation involve the enactment of invalidating laws. Yet, each time an invalidating law operates, it denies validity to an act which would be valid in natural law. In a word, something permitted by natural law is denied validity by the State.

The second argument proposed against the Church's power to invalidate the natural consent to marriage was partly theological. It was maintained that before the Council of Trent clandestine consent constituted the matter and form of the sacrament of Matrimony and that if any solemnity were required to be added to this natural consent it would involve a change in the matter and form of the sacrament. In other words, natural con-

sent had been sufficient for marriage before the Council of Trent, but afterwards it would be considered insufficient — so the argument went. Hence the matter and form of marriage would be altered. But, it was further maintained, the Church had no power to alter the matter and form of a sacrament. Therefore a law invalidating natural consent was beyond the power of the Church, it was contended.

The reply to this argument emphasizes again the contractual nature of marriage. The contract which results from the expression of consent is not entirely in the hands of the contracting parties. Rather, this contract is chiefly within the jurisdiction of the authority which regulates it. It is for this authority to establish norms according to which valid consent can be expressed and according to which a contract will be recognized. With this in mind, it is evident that no alteration of the matter and form of the sacrament of Matrimony is involved. Mutual consent is still required, but a specified manner of expressing this consent is demanded. It is merely the manner of expressing consent which is altered. The actual matter and form of the sacrament are not affected. Before the Council of Trent no solemnity was demanded for the validity of marriage, and natural consent sufficed. After the Council of Trent no change in the nature of the necessary consent was introduced. Consent as such remained, but it had to be expressed in the presence of the pastor and witnesses. It is improper to designate the requirement concerning the manner of expressing consent as an alteration of the matter and form of the sacrament of Matrimony. Hence, there is, in the Tridentine form of marriage, no exercise of power beyond the competence of the Church.[7]

This doctrine of the earlier canonists has continued to the present day. Canonists who pause at all to offer reasons why the legislator can enact invalidating laws say practically the same thing as was said earlier. Van Hove,[8] for instance, states that it is the common practice of Church and State to enact invalidating laws because of their occasional necessity. Like Suárez, he sees

no contradiction between natural liberty and the use of invalidating laws. He maintains correctly that rights are subject to the Church and the State. Van Hove, however, does emphasize that an invalidating law does not act contrary to the law of nature. All right to act from the natural law is conditioned by the use of social authority. In this way an act which would be valid according to natural law can be invalid by reason of the existence of a pertinent invalidating law. This is a clear statement and of tremendous practical importance. There is no doubt that a man frequently considers himself free to act provided no obvious harm to others results from his actions. Again, there are many matters in which a person feels that his action is not really of public interest but, rather, affects only himself or his family and friends. Hence, in such circumstances he is unlikely to learn whether an invalidating law prevents him from acting legally. He may be entirely unaware that he is legally incompetent to act. Nevertheless an invalidating law can annul his act. Or consider, for instance, a contract made without the required formalities. The Church in this instance[9] adopts the civil law. The matter of this contract may not be of public utility, but it must, because of the constant danger of fraud, be drawn up in a certain way. Lack of required formalities will vitiate the contract. Van Hove, then, succinctly lays down a rule of real importance.

There is no doubt, therefore, that the legislator has the power to enact invalidating laws. There is no need to offer many arguments to prove this statement. If one bears in mind the broad duty of the legislator to enact laws for the common good, and at the same time considers the possible carelessness and even fraud that accompany men's actions, the absolute need for invalidating laws will at once be evident. It is true that such laws are not in punishment of actual fraud or other crime, but they are based on a recognition of the danger of fraud. This danger always exists.[10]

Again, considering the necessity for maintaining public order and preserving public decency, the need for invalidating laws is

equally evident. Certain aspects of public order must be insisted upon for the common good, and certain natural or legal relationships must be respected. In order to provide for these matters, too, invalidating laws are necessary.

While the power to enact invalidating laws is everywhere conceded, there is also no doubt that custom in the course of time has demanded that the legislator clearly and definitely indicate his purpose in annulling acts or in declaring persons legally incompetent to act. But this will be treated in a later chapter,[11] where it more properly belongs.

Further, if the question be asked whether the power to enact invalidating laws can be surrendered, it must be answered that such renunciation must be denied.

The need for invalidating laws is constant. Such laws, it is repeated, are based on a recognition of the danger of fraud, on the necessity of preserving public order and public decency. It is true that individual cases can and do occur where items can be sufficiently provided for without invalidating laws. But these are points of fact and in no way destroy the general presumption that fraud may exist, that public order must be maintained, or that public decency must be respected. Certainly, if a valid reason exists why an invalidating law should not be applied, a dispensation should be requested.

The duty of the legislator is to provide for the common good. He must, then, in his laws consider all the circumstances of acts; he must take into account the ambitions and the weaknesses of men. He cannot legislate as if men had no faults or were entirely unwilling to profit by their neighbor's ignorance or simplicity. Further, he must consider everything that has any social implication, and must provide for possible contingencies. These are constant responsibilities which are discharged by means of law. How, then, could a legislator surrender his right to enact suitable provisions? Fraud, for instance, in an individual case can be considered to be non-existent, but what of the thousand other cases? It is precisely because of the constant danger of fraud

that certain invalidating laws are enacted. Parallel reasons exist for the enactment of other invalidating laws.

A further question arises in regard to the quantity of legislative power necessary to enact invalidating laws. The question is of importance, for there are legislators in the Church who are not endowed with full legislative powers. Does any measure of legislative power suffice for the enacting of invalidating laws? Before this question is answered, a very brief outline of the hierarchical nature of the Church should be given. In this way the various persons who possess jurisdictional and legislative power will be indicated.

By divine law the Supreme Pontiff legislates for the entire Church. There is no section of the Church either in ritual or discipline which is exempt from his laws. However, subordinate to this universal jurisdiction is the territorial jurisdiction of the territorially contained diocese or its equivalent in law.[12] Together with this subordinate division of power, there also exists in the Church jurisdiction which is not limited to territory.[13] All Ordinaries, both local and religious Superiors in exempt clerical communities, possess real jurisdictional power. The religious Superior, however, is controlled not only by the general principles of law but also by the provisions of canon 501, § 3. There is no necessity of expatiating on the details contained in this canon. All that is intended is to indicate the possession of jurisdiction and to study this jurisdiction to see whether it is sufficient to enact invalidating laws.

The first Ordinary to be considered is the bishop of a diocese. There is no doubt at all that a bishop's jurisdiction includes the power to enact laws. This is clearly stated in canon 335, § 1.[14] The only restriction placed on the legislative power of the bishop is the command stated in the same canon that his power is to be used in accordance with sacred canons. Within this field the bishop's power is ample and sufficient. His laws are binding.

Further, while his diocese is territorially circumscribed, a bishop is competent to enact personal laws which will bind beyond

his territory. His power, then, is over both territory and persons. From this source no restriction can be deduced which would deny a bishop the right to enact invalidating laws.

But is there any other reason why this power should be denied? There is nothing in the Code of Canon Law which would support such a denial. Canon 1039, § 2,[15] cannot be alleged as an instance. This canon does not contemplate a law. It merely provides a precautionary prohibition. It could be compared to a very serious and urgent counsel. The problem on the matter of marriage considered in canon 1039 is one that can have serious repercussions. Accordingly, a local Ordinary is authorized to forbid a marriage for a just cause. The canon states other restrictions concerning marriages and then goes on to say that only the Apostolic See can attach an invalidating clause to such a prohibition. Hence disobedience to the local Ordinary's prohibition would not invalidate the marriage. While the prohibition of the local Ordinary is a serious one, it does not follow that it is to be considered a law. The local Ordinary is authorized to prohibit a marriage only in particular cases. There is no authorization for all cases. This idea excludes the notion of a law. Therefore, canon 1039, § 2, cannot be adduced as a restriction on the right of the bishop to enact invalidating laws.

Any comprehension of the actual legislative power of the bishop will indicate that he must possess the right to enact invalidating laws. The same difficulties and dangers that necessitate the rule of the universal legislator make necessary also, in a limited sense, the rule of the bishop. It certainly must be admitted that reasons which would prompt the universal legislator to annul certain acts or to render some persons legally incompetent to act, can also be found in lesser jurisdictions. In his own diocese it is the duty of the bishop to provide for the common good. Under the Supreme Pontiff he is the legislator who should provide for the needs of his diocese. His office includes the maintenance of public order and the preservation of public decency.

Once we have conceded the right of the bishop to enact invalidating laws, it is necessary to learn whether this right is in any way restricted.

A bishop promulgates laws that are either entirely outside the actual text of the Code of Canon Law, or which are particularizations of general laws furthering discipline in his own diocese. Despite its wide range of jurisdiction, the Code of Canon Law cannot possibly provide for all local conditions and all contingencies. Such provision is left to the bishops acting in councils and synods.

A bishop is competent to legislate on any matter necessary or useful to his diocese. This presupposes that the content of the projected law is in harmony with the Church's purpose. Obviously the bishop has no legislative competence in items foreign to the Church. It must be remembered that the Church is a religious organization and not a political faction or party. Naturally the restrictions on the Church's power to legislate in general[16] will apply also to the competency of the bishop in particular. But within his own ample field the bishop is competent to legislate. His competence includes any means that are necessary or useful in order to fulfill the purpose of his law. Therefore, if in the judgment of the bishop an invalidating clause must be attached to his law, contrary acts will be invalid. In the same sense, a person who is declared by diocesan law unable to act legally is bound by this inability. Again, whenever the bishop indicates that certain formalities, e. g., in contracts, etc., must be fulfilled before he will recognize an act as valid, these formalities must be carried out. As was stated earlier in regard to the concept of invalidating laws,[17] these restrictions and formalities are not penalties. They are aids which the bishop uses to further good government. They constitute a protection for the people.

Besides legislating on matters entirely outside the Code of Canon Law, a bishop may by his own law particularize the general law of the Code. Frequently, the Code of Canon Law will merely state the broad outline of discipline and leave its nar-

rower application to diocesan statutes. Thus the groundwork for diocesan statutes is already laid, and the bishop merely adapts the discipline of the Code to the needs of his own diocese.[18]

In regard to such a particularization of the general law, is the bishop competent to attach an invalidating clause? It is not easy to answer the question. On the one hand, the bishop is making definite use of his legislative power; and, on the other, his law is not matter over which he has full control. The answer is not to be found in either of these facts considered by itself.

Neither history nor contemporary canonical doctrine can guide one in forming an opinion on the question proposed. There is, however, a principle of law that will suggest a solution.

Canon 335, § 1, states the fundamental law for the legislative power to be exercised by a bishop. This canon says that such power is to be exercised in accordance with the Code of Canon Law. We have had occasion to refer to this before, but it is equally applicable here. The wording "in accordance with canon law," indicates, we must emphasize, that the restriction placed upon a bishop in legislating for his diocese extends beyond the mere inability to rule contrary to the actual text of the general law of the Code. The phrase *ad normam sacrorum canonum* includes also the spirit of the law. It would scarcely be correct, therefore, to say that a bishop could honor the text of the Code and reject its spirit. Ryan, in his work on the principles of episcopal jurisdiction, says: "His [the bishop's] legislation *secundum ius* is directed to the adaptation of the higher law to his diocese. The higher law is the superior legislator's mind as to the means of procuring a particular end. In accommodating the higher law to the specific territorial characteristics of his diocese, the bishop must take cognizance of both the mind of the legislator and the purpose which the superior legislator intends, since both of these must be substantially respected and preserved intact."[19] It is true that Ryan does go on to say that under certain circumstances a bishop may impose a sanction in his adaptation of the general

law,[20] but, in speaking of sanctions or penalties, Ryan does not indicate that he necessarily includes an invalidating clause. On the contrary, he later maintains[21] that "a bishop cannot prescribe conditions for the validity of any matter which the Holy See has regulated without such invalidating provision, unless this power is conceded to him by the supreme legislator." In support of his contention, Ryan cites Benedict XIV.[22]

The opinion of Ryan could be immediately adopted if the quotations just made considered every kind of papal enactment. But his opinion is not clear. Ryan is considering possible episcopal invalidating laws only in respect to something explicitly *permitted* by higher authority. In this case it is obvious that the bishop cannot restrict permissions granted by the Pope. The difficulty still remains, however, as to whether a bishop can attach an invalidating clause to a particularization of the general law — although the first quotation from Ryan's useful book does throw some light on how a bishop should legislate. However, if this second quotation from Ryan really means that whenever the supreme legislator has in any way ruled on a matter, no inferior legislator can go counter to it, Ryan's statement would indicate his opinion that a bishop cannot attach an invalidating clause to *any* adaptation of the general law. For the mind of the legislator is just as compelling in a prohibitory law as in a preceptive or permissive law. His mind must be respected.

It has been said above that the phrase *ad normam sacrorum canonum* in canon 335, § 1, covers more than the mere text of the Code of Canon Law. Hence it follows that if a bishop is competent to attach an invalidating clause when adapting a general law to the particular needs of his diocese, the general law in question must show some indication that its provisions, when adapted by the bishop of the diocese, could be enforced with invalidating clauses. After all, the adaptation of a general law of the Code to the particular needs of a diocese is not a matter independent of the Code. Therefore, a bishop has not full control of this matter such as he would have if he were acting in

regard to items not contemplated or expressed in the Code of Canon Law. A bishop is therefore bound to follow the general outline of the universal law. He can adapt; he can particularize, but he cannot legislate contrary to the spirit of the universal law which he is adapting or particularizing.

In regard to permissive laws, then, a bishop can, when the universal law permits such adaptation, place further conditions which he judges necessary or useful for his diocese. Similarly, in regard to prohibitory laws permitting adaptation, a bishop can further restrict the actions of his subjects. But in neither of these cases can he enforce his law with an invalidating clause unless the general law indicates that he may do so in his adaptation.

This is no essential restriction of the bishop's power to legislate. In the matter under discussion a bishop is not the sole judge. He is conceded power to legislate concerning the needs of his diocese, but this is to be exercised in accordance with the principles of law demonstrated in public ecclesiastical law[23] and as indicated in canon 335, § 1.

Another possibility of the bishop's power to enact invalidating laws should be examined. This takes up a question quite distinct from that of the bishop's ability to attach an invalidating clause when particularizing the general law. A bishop can *in his own law* add penalties to the general law of the Code.[24] This power is not unrestricted, but in a general way a bishop can urge the observance of the common law of the Church by penalties of his own.[25] Would this power imply the use of invalidating clauses as penalties?

There is no doubt that an invalidating clause can be a penalty, but this is not its purpose. Whenever, then, an invalidating clause is actually and demonstrably a penalty, it should be considered in this light and not as a clause introduced into the law for the common good. However, an invalidating law such as has been the subject of discussion in the preceding pages is not a penalty. Nor is there any reason to argue that the power to place a penalty or sanction implies the power to attach an in-

validating clause. The two items are juridically distinct and bear no juridical relationship. It is only exceptionally that an invalidating clause can be construed as a penalty. Sanctions and invalidating clauses are not in the same category. There can be no discussion of the greater or the less in regard to them. Both are instruments that a legislator can use to achieve his specific purpose. Should he decide to combine the two in protecting the common good and (at the same time) in punishing a culprit, the legislator is normally competent to do this, but the two items under discussion are not interchangeable, nor are they normally conducive toward obtaining the same end. It must be said, therefore, that the power granted to a bishop to strengthen the general law by his own penalties does not imply the power to attach an invalidating clause to his adaptation of the general law.

There is one more point to consider regarding a bishop and an invalidating statute. In some synods, a few statutes merely repeat the law of the Code. There is no adaptation intended. Obviously, in such a case, the bishop cannot add anything to the text of the Code either by way of denying permission or inserting inabilities.

The right of the bishop to enact invalidating laws has been discussed at length not only for its own sake but also because it serves as a model for Ordinaries of territories not yet organized into dioceses but considered equivalent in law.

Vicars and prefects apostolic are true Ordinaries of the territories assigned to them.[26] They possess the same rights as residential bishops unless the Apostolic See has made some restrictions.[27] As Ordinaries, then, vicars and prefects apostolic enjoy the right to legislate for their subjects. The Code carries no restriction of this right. It must be said, therefore, that the power of vicars and prefects apostolic is as comprehensive as the legislative power of the residential bishop.

The description of various uses of legislative power by the residential bishop is equally applicable here. Where the vicar and the prefect apostolic enjoy full right to legislate, they may

attach invalidating clauses to their laws. But, where the Code has already legislated in a general way, the vicar and the prefect apostolic are bound by the spirit of the law. Therefore, in a permissive or preceptive law they cannot demand certain formalities or conditions not contemplated by the supreme legislator; nor in prohibitory laws can they forbid something as being null and void when this canonical effect is not discernible in the general law.

Yet it must be understood that vicars and prefects apostolic are not temporary successors in office. They rule as the equivalent of residential bishops and are not subject to the restrictions placed upon temporary successors in office.[28]

Vicars and prefects apostolic, however, must immediately upon assuming their office select a provicar or a proprefect. This must always be done unless a coadjutor with the right of succession has been named.[29] These provicars and proprefects are in point of fact temporary successors in office, yet in case of succession the whole rule of the territory devolves upon them, as canon 309, § 2, indicates. Thus it could be inferred that provicars and proprefects have entirely equal powers with vicars and prefects apostolic. There is a word added in canon 309, § 2, which does not appear in other canons that treat of vacant and impeded sees. Canon 309, § 2, uses the phrase *totum debet regimen assumere;* canon 429, § 1, says *dioecesis regimen;* canon 431, § 1, *ad capitulam ecclesiae cathedralis regimen dioecesis devolvitur;* canon 432, *vicarium capitularem qui loco sui dioecesim regat.* Thus all the other canons that consider the rule of a vacant or impeded diocese speak in a general way of the interregnum without emphasizing that the rule of the whole diocese passes to the temporary successors. Is this addition of a word in canon 309, § 2, intended to indicate that the provicar or the proprefect can change the law of the vicar or prefect apostolic and add invalidating clauses? Such power, incidentally, would be more extensive than that which is clearly conceded to the vicar-capitular in canon 435, § 1, who is also bound by canon 436. This latter canon says that noth-

ing should be changed during the vacancy of the see. It is difficult to believe that the legislator intended to grant more power to a provicar than he grants to a vicar-capitular. Both are in point of fact temporary rulers of territories. Both enter upon their offices with the assumption that the vicar-apostolic or the residential bishop had adequately provided for the needs of the people.

Moreover, it must be remembered that the offices of provicar and proprefect are a temporary arrangement. The reason for their existence is the same as that which supports the office of vicar-capitular. These offices ought, therefore, to be judged by the same underlying principles that control the actions of the vicar-capitular. This is another instance where the spirit of the law must be considered. Nothing — at least nothing of importance — should be changed during the vacancy of a diocese. This same restriction should be binding in the case of the provicar or the proprefect. How this restriction is to be considered we shall subsequently indicate.[30]

Another Ordinary whose powers to legislate must be examined is the apostolic administrator. There are two kinds of apostolic administrators: one is permanently designated; the other is a temporary ruler. The former alone will be considered at this point.

The apostolic administrator permanently designated has the same power in law as a residential bishop.[31] Everything, then, that has been said about the right of a bishop to legislate applies equally to the apostolic administrator. This administrator is an Ordinary in his own right and is not dependent on the bishop of the diocese. In fact, with the advent of an apostolic administrator and during the time he is in office, the bishop's power is suspended.[32] This is mentioned because the apostolic administrator is not an auxiliary to the bishop of the diocese. He is an entirely independent Ordinary. Nor, in regard to the apostolic administrator under discussion, are we dealing with a temporary Ordinary. We are dealing with a successor, of equal right, who

obtains his power not by delegation but from the general law of the Code.

Applying, then, the rule of equality in law between the bishop of the diocese and the apostolic administrator, the latter can legislate with invalidating clauses in matters entirely beyond the Code, but he cannot so legislate in matters over which he has not full control.

A word, too, must be said of abbots and prelates *nullius*. These are Ordinaries who rule territories separated from a diocese.[33] According to canon 323, § 1, abbots and prelates *nullius* enjoy the same ordinary powers that are possessed by a residential bishop. Among these powers is, of course, the right to legislate with invalidating clauses, and this right must then be conceded to abbots and prelates *nullius*. Naturally the same circumscription of this power that is indicated above for bishops and apostolic administrators will be in force here.

Besides acting alone in their legislative capacity, bishops, prefects apostolic, etc., sometimes assemble in plenary and in provincial councils. The local Ordinaries who are to assist in the deliberations of such councils are named in canons 282, § 1; 285; and 286, § 1. No greater legislative power is granted to the bishops, prefects apostolic, etc., assembled in such councils than is conceded to bishops acting alone. The Code of Canon Law does restrict the power of the individual local Ordinary to dispense from the law of plenary and provincial councils,[34] but it does not grant more power to the council than each bishop, prefect apostolic, etc., inherently possesses. The power, then, of a plenary and a provincial council to enact invalidating laws is exactly the same as that possessed by each bishop, prefect apostolic, etc. In matters over which the council has full control, invalidating laws can be made; in matters where this full control does not exist, such laws cannot be enacted.

It is useful here to recall that the Holy See's approval of the acts of a plenary and of a provincial council does not give to these acts specific papal authority.[35] It may be that some act of

a council might attach an invalidating clause to a law not so fortified in the Code of Canon Law. This would not mean that the Holy See has permitted the Fathers of the council to modify the general law. To make such modifications, specific approval would be required, and this is not presumed in the general approval accorded to the acts of the plenary and the provincial councils.

The office of vicar-general should also be examined in regard to invalidating laws. In law a vicar-general is a true Ordinary.[36] According to canon 368, § 1, a vicar-general in a diocese enjoys universal jurisdiction with the bishop of the diocese, provided the bishop has not reserved certain powers or the Code itself has not demanded a special mandate. This would seem to indicate that a vicar-general could legislate outside of a diocesan synod. As far as legislation in a synod is concerned, a vicar-general is unable to act because he cannot summon a synod. This is expressly forbidden him unless he has a special mandate.[37] Further, canon 362, which treats of the synodal legislator, uses the word *episcopus* and not *Ordinarius.* While it is not entirely clear whether a vicar-general is forbidden to legislate *outside* a synod, it would be contrary to the spirit of the law to concede him such power. If this power is to be denied him, it would be useless to speak of his inability to make invalidating laws. But if this power is really his, he would be subject to the same restrictions as the bishop of the diocese. It is beyond the scope of this study to investigate and determine the existence of the power of the vicar-general to legislate.[38] All that need be said here is that the vicar-general, if he possesses the power to legislate outside of a synod, cannot attach invalidating clauses to an adaptation of the general law when the latter does not contain such a clause.

Besides providing for local Ordinaries permanently established in office, the Code of Canon Law legislates also in regard to the temporary rule of a diocese. Succession is variously determined, and this is a matter which will be investigated in order

to learn whether temporary successors in office can enact invalidating laws.

When a residential bishop loses his office in one of the various ways indicated in the Code of Canon Law,[39] he is succeeded normally by the cathedral chapter.[40] The cathedral chapter must within eight days elect a vicar-capitular.[41] Where a cathedral chapter is not constituted, a board of diocesan consultors takes its place, and this board elects a vicar-capitular, who, in the United States, is called an administrator.[42] There may be circumstances which call for a change in the normal succession, and this change is provided for in canon 355, § 1, and canon 431. The first of these canons indicates that the coadjutor with the right of succession immediately becomes the Ordinary. The second of these canons, besides admitting the possibility of change in the normal temporary succession, indicates that if a bishop or archbishop is by special designation of the Holy See to rule the vacant diocese, he possesses the power of the vicar-capitular. If the succession of the coadjutor is omitted, the temporary succession of other Ordinaries can be considered to be the same thing. There is a difference of persons but not of power. Hence it will be sufficient to consider the vicar-capitular.

To what extent does succession in office entitle a vicar-capitular to legislate? Canon 435, § 1, gives the fundamental law for the power of the vicar-capitular.[43] In this canon it is stated that the vicar-capitular enjoys the ordinary jurisdiction of the bishop except in matters expressly denied him. This is a broad statement, and if considered alone would entitle the vicar-capitular to enact any law which a residential bishop would be competent to make. But in the interpretation of laws it is necessary to view the whole subject before an opinion can be rendered. Now in canon 436 there is an old maxim which has great significance. "*Sede vacante nihil innovetur.*" While the application of this rule has largely been centered on the alienation of goods and the restrictions against disposition of the properties belonging to the episcopal benefice,[44] the significance of the rule is broader than its historical

meaning. It really means that nothing should be done during the vacancy of a diocese that would change its rule. This is not to say that a vicar-capitular's power to rule is nugatory. Not at all. But because of the restrictions made in various canons,[45] it is evident that much actual power is denied to a vicar-capitular. Now to legislate is one of the principal rights of the residential bishop. To attach invalidating clauses to his laws is likewise a right of the residential bishop under definite circumstances. The vicar-capitular as successor to the residential bishop could undoubtedly enact new invalidating laws in precisely the same way as a residential bishop. This much power is to be conceded to him because he is to rule the vacant diocese.

But where an actual change in the existing law is contemplated, one hesitates to assign such power to the vicar-capitular. Of course, it is fundamental that the purpose of the office of vicar-capitular is the government of the diocese; and if a change of law is definitely required for the betterment of the diocese, it would be difficult to deny absolutely the right of the vicar-capitular to change a law so that it could annul acts or declare persons incompetent to act. If the broad principle of canon 435, § 1, be invoked, this right must be conceded; but if this principle is taken into consideration with the rule laid down in canon 436, the question remains doubtful. Changing the application of a law is a serious thing. It involves a new judgment on what is necessary to protect the community. That urgent necessity may exist in the comparatively brief period of the vicar-general's incumbency may be seriously doubted. Invalidating laws are not the production of light thought. They are the result of long and profound thinking, with every consideration given to the hardship they may at times occasion. To place new burdens during the vicar-capitular's incumbency seems hardly justifiable. Therefore, while it cannot be proved from the actual text of law that a vicar-capitular is incapable of adding invalidating clauses to existing diocesan law, it should be said that such power is contrary to the spirit of canon 436. *"Sede vacante nihil innovetur."*

These reflections are equally applicable to the temporary succession of provicars and proprefects in missionary countries. Some remarks comparing the office of vicar-capitular and of provicar and proprefect have already been made.[46] Here it is sufficient to reflect that the very idea of temporary succession in law precludes any notion of full control of the powers of one's predecessor. The offices of vicar-capitular, provicar and proprefect were instituted to enable the regular and normal work of the diocese or mission to continue. To do this work satisfactorily scarcely requires changing a particular law so that disobedience to it will entail invalidity of acts or incompetence of persons.[47]

One more office needs to be examined in regard to invalidating laws. This is the office of the vicar described in canon 429, § 1. If a bishop, for instance by exile, is so impeded that he cannot even by mail communicate with his subjects, the Code provides that the vicar-general or some other ecclesiastic delegated by the bishop will rule the diocese. The Code does not say that the powers of this vicar are those of a vicar-capitular. It does, however, state that the powers of a vicar-capitular are given to the vicar who in similar circumstances is elected by the cathedral chapter. Such an election can be held when no vicar-general has been appointed by the bishop and no other ecclesiastic has been delegated to act. It could also be done if the vicar-general or the ecclesiastic delegated by the bishop has been similarly impeded.

It would be wrong to say absolutely that the rule of the vicar contemplated in canon 429, § 1, is the same exactly as that of the vicar mentioned in the third paragraph of the same canon. But the whole tenor of the law expresses something that is understood to be a temporary arrangement. The need of a temporary ruler is just as well indicated in the third paragraph as in the first paragraph of canon 429. It is therefore reasonable to assume that the legislator intended that the vicar-general who assumes the rule of the diocese when the bishop is impeded should govern as a vicar-capitular. This, however, cannot be proved from the text of canon 429. It is merely the result of a comparison between

the two ways of determining upon a vicar who would act in the emergency.

From this comparison it would also be reasonable to conclude that the vicar-general can no more change diocesan law so as to enable himself to annul acts or declare persons incompetent to act than can a vicar-capitular.

The treatment of the aforementioned Ordinaries and vicars concerns territorial rule and personal inabilities. How far these laws are of obligation outside the diocese or its equivalent will be considered in the chapter on the interpretation of invalidating laws.[48]

Besides considering the powers of local Ordinaries we must also study the powers of religious Superiors and chapters. Some Superiors possess only dominative power over their subjects. These Superiors need not be considered in this treatise because they are unable to enact a law[49] and therefore unable to deny legal validity to acts or to declare persons legally incompetent to act. Precepts, of course, can be given by these Superiors, and punishment can be inflicted for the violation of precepts, but the punishment cannot be equivalent to an invalidating clause. Such a clause has force only in a law or in a precept imposed by one enjoying legislative power.

Besides these religious Superiors who have dominative power, there are other religious Superiors who possess jurisdiction. It is pertinent to examine their power in regard to ability to legislate and, consequently, to enact invalidating laws.

Canon 501, § 1, of the Code of Canon Law grants jurisdiction to Superiors and chapters of exempt clerical religious. The Code does not specify in this canon which Superiors and chapters are to enjoy this power. It does, however, say that this power is to be exercised according to the Constitutions of religious communities and according to the general law. This injunction refers principally to the jurisdiction and power of the major religious Superiors enumerated in canon 488, 8°.[50] The exercise of jurisdiction by religious Superiors and chapters is an arrangement that

supplies the lack of jurisdiction of the local Ordinary by reason of the privilege of exemption. This privilege is conceded in law to Regulars,[51] but outside the law may also be obtained by special concession.[52] Exempt clerical religious form a community over which Superiors and chapters exercise a jurisdiction that is mostly personal and only incidentally territorial. With this brief introduction, the power in such a community can be examined.

The Code, in canon 501, § 1, grants jurisdiction to both religious Superiors and to chapters. This is not an entirely unrestricted grant of power. Rather, it must be understood as being given in accordance with the Constitutions of the religious. Hence, if the Constitution does not permit the full exercise of jurisdiction to a religious Superior but restricts the full use of this power to the chapter, the religious Superior cannot claim jurisdiction as granted by the Code of Canon Law. The controlling element, then, is the pertinent provision of the Constitution.

It will be unnecessary to examine all the Constitutions of exempt clerical religious. Several will suffice. We shall take as models the Constitutions of the Order of Friars Minor, the Order of Preachers, and the Rule of St. Benedict.

The Constitutions of the Order of Friars Minor states, in No. 455,[53] that the general chapter has power to make laws provided these laws are not contrary to the Constitution. There are also some restrictions stated that are not pertinent to the matter at hand. But the Constitution makes no provision for the exercise of legislative power by the Minister General. All of Section 15 (Nos. 513-520) describes the rights and duties of the Minister General, but nowhere is the clear right to legislate alone conceded. The Minister General has power to dispense from laws[54] but no power to enact them.

The Constitutions of the Order of Preachers[55] provides for laws (*ordinationes*) to be made by the general chapter.[56] However, it is also indicated in No. 33, § II, that laws may be made by the Master General of the Order. This power is fully described in No. 470 of the Constitution. It seems likely that the

word *ordinationes* of No. 33, § II, should be accepted in the sense of law. The word occurs in both paragraphs of No. 33 where promulgation of law is treated. The same word is used in connection with the promulgation of the ordinances of both the general chapter and the Master General. It is true that in No. 513 the Constitution speaks specifically of the power of the general chapter, and there it says *"ad condendum leges aut ordinationes";* but this is not the language used where the Constitution speaks of promulgation. Moreover, since the title of the chapter that deals with promulgation of ordinances is *De Legum nostrarum Promulgatione,* etc., the conclusion must be that law and ordinance are considered in the Constitution as signifying the same thing. This would indicate, then, that the Master General is entitled to enact laws.

The Rule of St. Benedict[57] does not provide for rule of the community by chapters. The power to rule is in the hands of the abbot. The monks should occasionally be called for counsel, but St. Benedict clearly indicates that there is no power higher than or equal to that of abbot.[58] Whatever legislative power would exist in an abbey is exercised by the abbot alone.

Much more, of course, could be said of the legislative power existing in a religious community, but the above outline is sufficient to indicate the controlling force of the Constitution.

Modern authors agree that some legislative power at least is granted to the chapters of exempt clerical religious. Wernz and Vidal, for instance, say[59] that the general chapter can at least make true ecclesiastical laws. But they also say that usually the highest religious Superiors lack this latter power. Instead, where particular law does not forbid it, they concede a power to enact a perpetual ordinance, which, while lacking the authority of the Constitution or a law of the general chapter, does have the force of a rule. Such rules would have all the necessary elements of an ecclesiastical law. There seems to be more of a difference of solemnity than a difference of legal force. Fanfani[60] merely says that legislative power in religious communities is

reserved to chapters and Congregations and not to Superiors. Schäffer[61] says that usually only the general chapter can make a law in the strict sense. Vermeersch and Creusen in one place[62] say in a general way that matters of great importance are left to the chapter, and in another place they say that at least general chapters can enact laws.[63] The highest religious Superiors, they continue,[64] frequently cannot enact laws. Cocchi[65] says briefly that chapters can enact laws, but he hints that Superiors can also legislate. However, in a footnote Cocchi cites the above-mentioned doctrine of Vermeersch and Creusen. Augustine[66] says that the general chapter has the right to enact and repeal laws and statutes unless these have been specifically ratified by the Pope. Writing in particular of Benedictine Rule, Augustine also says[67] that Abbot-Presidents cannot make rules for the Congregation or the Order. The reason assigned is that a Congregation of Benedictine monks (e. g., the American-Cassinese Congregation) is not a juridically united body.

This doctrine of modern or post-Code authors agrees generally with the teaching of canonists in the decades before the Code of Canon Law. Grandclaude, for instance, says[68] that legislative power is sometimes exercised by the general chapter alone, sometimes by the General Superior alone, and sometimes by this Superior and the provincial Superiors together. Hence, there was no hard and fast rule to which all the religious communities conformed. The only way to determine who possessed legislative power would be to consult the various Constitutions. Bouix[69] implied that Superiors have legislative power. This power was called quasi-episcopal. The word is taken from a decretal of Pope Alexander IV,[70] and, according to the interpretation of canonists, it included jurisdiction, but it did not extend to actions in which the power of episcopal orders is necessary.

It will be readily evident, then, if we exclude the consultative Chapter of the Benedictines, that the general chapter of an exempt clerical religious community is competent to legislate. This same statement cannot be made of even the highest Superior

of these religious. His right to legislate may exist, but it must be demonstrated from the Constitution.

Given the power to legislate, can general chapters and religious Superiors enact invalidating laws? Their power is, as Pope Alexander IV described it, quasi-episcopal. It should, then, be on the one hand as extensive as a residential bishop's, and on the other it should be circumscribed by the same limitations. Without repeating the argument given in the discussion of the bishop's power to enact invalidating laws, the same conclusions can be set down in regard to the actual extent of legislative power in a religious community. General chapters — and, where the power is conceded them, religious Superiors — can attach invalidating clauses in regard to matters otherwise not considered either in a general law of the Code or in the approved Constitution.

One item proper to a religious community and not pertinent to the rule of a diocese is the possible change in the law of the Constitution. If a Constitution grants certain rights, can a general chapter enact an invalidating law so that a member of the community is unable to exercise this right? The answer to this question depends on whether the Constitution has been approved by the Holy See. It is a purely theoretical point because the Constitutions of communities where legislative power exists have been approved by the Holy See. Therefore, with this approval, the law of the Constitution is supreme and cannot be changed without the consent of the Holy See. What is contemplated here is not a penalty which could be imposed for crime, but rather a law which would declare members incompetent to act under the Constitution.[71]

## Chapter IV

# THE INTERPRETATION OF INVALIDATING LAWS

SEVERAL questions should be investigated in a study of the interpretation of invalidating laws. The law of the Code in canon 11 is the substance of the common opinion held for several centuries. This law excludes the effect of invalidity from any law unless an invalidating word or clause expressly or equivalently states this effect.[1] But this is only one of the questions to be investigated in the study of the interpretation of invalidating laws. And it is important to note that the law as stated in canon 11 of the Code is not the original interpretation of a prohibitory law. How the force of a prohibitory law came in time to be reduced frequently to a mere prohibition without any invalidating effect is in itself an interesting study which will be pursued, from the enactments of Theodosius II and Justinian to the present law of the Code.

Another question to be investigated is the scope of the word *aequivalenter* in canon 11 of the Code. There are laws which declare an act invalid in terms equivalent to the actual meaning of the word *expresse.* There are other laws which demand certain formalities or solemnities without which an act is invalid. These formalities or solemnities are held by several canonists to be the real interpretation of the word *aequivalenter* in canon 11 of the Code of Canon Law.[2]

A third question to be investigated is the study of the presumption which supports the application of canon 11 of the Code of Canon Law. Many invalidating laws are based on the danger of fraud. If this is a general presumption, the law would be applicable even though no actual fraud existed.[3] On the other hand, if this is not a general presumption, the law would be in-

applicable whenever fraud did not exist. It is important to know the presumption upon which the legislator bases his law. No correct interpretation of a law can be had without a serious study of the presumptions of law and fact which influence a legislator in his enactments.

Canon law to some extent was influenced by Roman law. This is apparent in many instances, but it is notably so in the case of invalidating laws.[4] Consequently, it is to the Roman law that attention will first be directed, to study the relationship between a prohibitory law and its effect. The important texts of Roman law to be studied have already been mentioned and briefly examined in the discussion on the nature of an invalidating law. These texts are the laws of Theodosius II and Justinian. A text from the latter is the one usually cited in a study of the interpretation of invalidating laws. Another text from the Code of Justinian can be, and at times is, cited to prove the effect of an invalidating law. This text is much shorter, and it has the conciseness of a rule of law.[5]

The text of Theodosius II will be examined first. Some unavoidable repetition will be found here, as a discussion of the interpretation to be given the law of Theodosius II will necessarily involve some statement of the nature of the law. The text follows:

*"Non dubium est in legem committere eum, qui verba legis amplexus contra legis nititur voluntatem. Nec poenas insertas legibus evitabit, qui se contra iuris sententias scaeva praerogativa verborum fraudulenter excusat.*

1. *"Curiales ne ad procurationem rerum alienorum accederent, cautum est providentissima sanctione, cuius in fraudem conducendi eos sibimet usupare licentiam, sublimitatis tuae suggestione comperimus. Quos licet pristinae legis laqueis irretiri cernamus (conductionem namque speciem esse procurationis certissimum est) attamen ne fraudis suae velamine leges lateant contemptores, neve eis fucata suae callidatis excusatio relinquatur,*

*hac perpetuo lege valitura sancimus, conducendi quoque fundos alienos licentiam curialibus amputari, locatos res fisci viribus vindicari.*

2. *"Conductor itaque locatori, vel contra locator conductori contra hanc legem nulla tenebitur actione. Nullum enim pactum, nullam conventionem, nullum contractum inter eos videri volumus subsecutum, qui contrahunt lege contrahere prohibente.*

3. *"Quod ad omnes etiam legum interpretationes, tam veteres quam novellas trahi generaliter imperamus, ut legislatori, quod fieri non vult, tantum prohibuisse sufficiat, cetera quasi expressa ex legis liceat voluntate colligere: hoc est ut ea quae lege fieri prohibentur, si fuerint facta, non solum inutilia sed pro infectis etiam habeantur, licet legislator fieri prohibuisset tantum, nec specialiter dixerit, inutile debere esse, quod factum est. Sed et si quid subsecutum ex eo vel ob id, quod interdicente factum est lege, illud quoque cassum atque inutile esse praecipimus."*[6]

The introductory part of this text of the law of Theodosius II states that there is no doubt that the law is broken if the spirit of the law is disobeyed while its letter is adhered to. Such disobedience to the law will itself entail punishment. These few lines of the text of the law of Theodosius II state a principle of law which scarcely needs explanation. It is an excoriation of fraud. Such fraud is to be punished. Actually, nothing regarding the interpretation of invalidating laws is to be immediately found in this part of the law of Theodosius II. This section can be considered chiefly as showing the specific instance which moved Theodosius II to enact his law. It is useful to see according to what principles of law he judged the case presented for his decision. These lines of his text can also be cited as supporting the penal nature of invalidating laws, because they do fulminate against fraud and indicate that fraud is to be punished. Whether the actual substance of the law is therefore penal in nature has been discussed in an earlier chapter. It need not be repeated here.

Paragraph 1 of the law of Theodosius II is a statement of a law which controlled the actions of the members of the curia

(*curiales*). This paragraph also contains an account of the method used to circumvent this law. The immediate judgment of Theodosius is likewise included.[7]

Paragraph 2 has two separate subjects. The first is a statement that no action is available for either party in the case of those who contracted contrary to the existing law. Specific reference is made to the infraction of the law mentioned in the first paragraph. The other subject of the second paragraph in the law of Theodosius is a statement of the fundamental principle of law that no agreement or contract can exist if the law forbids it. This latter statement is important. It shows the legal effect of a prohibitory law. Here is found the very substance of the law of Theodosius II. Later, he extends the application of his law, but in the statement *"nullum enim pactum,"* etc., Theodosius II clearly and definitely and unequivocally states the force of a prohibitory law. Its force is the power of invalidating any agreement or contract entered into contrary to law. How Theodosius II was led to state this effect of a prohibitory law or what abuse influenced him to make such an enactment is really immaterial. Even if it be maintained that punishment for fraud is intended in the application of this law, this is by way of including fraud within the scope of this law rather than a constructing of a new law applicable only to fraud.

It should be clear, then, that according to Theodosius II any agreement or contract contrary to law is invalid. So far no provision is made regarding the necessity or non-necessity of an invalidating clause in a prohibitory law. Judged by the law of Theodosius II, the opposition of the law itself to an agreement or contract is sufficient to invalidate it.

Theodosius II did not conclude his enactment with a judgment on the specific case presented to him. On the contrary, he proceeded to legislate further. This extension of his law and his own interpretation will be explained.

Paragraph 3 of the law of Theodosius II covers two new subjects and treats again one subject already mentioned. The

first new subject is an extension of the principle that a prohibitory law invalidates an act contrary to it in every interpretation of law whether old or new.[8] The second new subject is the statement that no specific clause is required in the prohibitory law in order that an act contrary to the law be invalid.[9] These two new ideas in the law of Theodosius II considerably add to one's understanding of the force of a prohibitory law under Theodosius. Later, in canon law, a distinction would be made between the prohibition of an act and its invalidation. This distinction is not recognized by Theodosius II. For him it was sufficient for invalidity if the legislator prohibited an act.

It cannot be denied that the law of Theodosius II is rigid. It must be kept in mind, however, that when a legislator prohibits an act he does not want that act performed. Everyone knows the fundamental difference between prohibiting an act and invalidating it. Theodosius II likewise knew this difference, but he nonetheless stated that a specific invalidating clause in a prohibitory law was unnecessary.

At the same time it must be remembered that Theodosius II was only one legislator. He was to be followed in the course of time by Justinian, who also interpreted his own law as not requiring a specific invalidating clause. But other legislators could be adduced to mitigate the rigidity of the law of Theodosius II. These legislators would state that they did not intend to invalidate an act unless they specifically stated this effect of a prohibitory law. Custom, likewise, could mitigate the force of a prohibitory law so that a specific invalidating clause would be required to invalidate contrary acts. Theodosius II, of course, had no real power over his successors, nor could he determine the actual force of prohibitory laws in canon law. While it is true that he was competent to state what he intended by his own law, his enactment would always remain his own, and it was not mandatory that it be adopted entirely by his successors or used as a principle of law by the legislators in canon law.

Concluding his law, Theodosius II repeats his earlier statement that an act contrary to a prohibitory law is invalid. Nothing more need now be said about this statement, as it has been sufficiently discussed above. Some further comment on this last sentence in the law of Theodosius II will be necessary later in the chapter, in the discussion of the immediate or non-immediate effect of invalidating laws. All that is necessary here is to establish the fact that according to Theodosius II a prohibitory law invalidated contrary acts.

While the law of Theodosius II is the source from which Justinian drew his own enactment stating the force of prohibitory laws, it is the latter's law which is usually studied and investigated when this matter is under consideration. At times comparisons are made between the two laws, but usually the law of Justinian is considered sufficient to show the force of a prohibitory law in Roman law.[10] Justinian's law follows:

*"Non dubium est in legem committere eum, qui verba legis amplexus contra legis nititur voluntatem: nec poenas insertas legibus evitabit, qui se contra iuris sententiam scaeva praerogativa verborum fraudulenter excusat. Nullum enim pactum, nullam conventionem, nullum contractum inter eos videri volumus subsecutum, qui contrahunt lege contrahere prohibente. Quod ad omnes etiam legum interpretationes tam veteres quam novellas trahi generaliter imperamus, ut legis latori, quod fieri non vult, tantum prohibuisse sufficiat, cetera quasi expressa ex legis liceat voluntate colligere: hoc est ut ea quae lege fieri prohibentur, si fuerint facta, non solum inutilia, sed pro infectis etiam habeantur, licet legis lator fieri prohibuisset tantum nec specialiter dixerit inutile esse debere quod factum est, sed et si quid fuerit subsecutum ex eo vel ob id, quod interdicente lege factum est, illud quoque cassum atque inutile esse praecipimus. Secundum praedictam itaque regulam, quam ubique servari factum lege prohibente censuimus, certum est nec stipulationem eiusmodi tenere nec mandatum illius est momenti nec sacramentum admitti."*[11]

The importance of Justinian's law is that it immediately states a principle of law. It does not indicate the occasion which perhaps induced Justinian to reaffirm the law of Theodosius. The law must therefore be taken as an expression of the will of Justinian in regard to every agreement or contract entered into contrary to the law. The same introductory sentence is found both in the law of Justinian and in the law of Theodosius II. From this it might be concluded that both laws were penal in nature, but this conclusion is subject to the criticism mentioned in an earlier chapter. Nor is the nature of the law of great importance at this time. All that need be established is whether a prohibitory law under Justinian had the same invalidating effect that it had under Theodosius II.

A comparison of the two laws shows that the will of Justinian coincided with that of Theodosius II. Everything, therefore, that can be said of the force of a prohibitory law under Theodosius II is equally true of the force of a prohibitory law under Justinian. Nor can it correctly be said that only fraudulent actions are contemplated by the law of Justinian. Rather, it should be said with Suárez[12] that the principle underlying prohibitory laws was extended to acts perpetrated by fraud. The same all-inclusive invalidating force of the law of Justinian is equally maintained by Bartolus in the fourteenth century.[13] Bartolus' doctrine on the force of a prohibitory law can be given in a few words. A contract contrary to the law is invalid: anything contrary to the law is worthless; where the law prohibits an act, the act is invalid, even though nothing further be said about it. So firm is the position of Bartolus that he demands a specific clause upholding the validity of an act performed contrary to the law if such an act is to be considered valid.[14] Strykius in the eighteenth century is equally certain of the immediate invalidating force of a prohibitory law. He says that anything contrary to the law is null.[15]

Barbosa's seventeenth-century commentary[16] on the law of Justinian is important, for he not only demands that a prohibitory

law contain a clause supporting the validity of a contrary act, but he expressly states that every prohibitory law has a tacit clause invalidating contrary acts.[17] This latter idea is an excellent paraphrase of the clause used by Justinian in determining the effect of a prohibitory law.[18] The words of Justinian should be clear enough to prove the invalidating effect of a prohibitory law, but Barbosa shows why such a law must produce such an effect.

Barbosa's commentary is likewise important for its clear explanation of the phrase *"non solum inutilia"* in the law of Justinian. He says that an act contrary to the law is not only null and worthless but is to be considered as never having existed.[19]

Biner[20] considers the law of Justinian only in relation to the effect of invalidating laws in canon law. After mentioning that in canon law a prohibitory law need not necessarily invalidate a contrary act, Biner admits that the law of Justinian offers a serious obstacle to such interpretation. He does not cut himself free from a necessary dependence on Roman law as Leurenius does[21] but considers this legislation carefully because of the citation of the law of Justinian in the decree of Gratian.[22] Consequently, Biner is at pains to compare the force of prohibitory laws in Roman law with that of prohibitory and invalidating laws in canon law. Almost all of his argument can be dismissed, since Biner admits that there is a difference between the force of a prohibitory law in Roman law and its counterpart in canon law. Biner says it is the will of Justinian to invalidate when he prohibits an act.[23]

Suárez offers a complete discussion of the law of Justinian.[24] Suárez feels that the law of Justinian is clear and unmistakable. In the introduction to his commentary on this law, Suárez says that a prohibitory law invalidates a contrary act. This he holds as true even when no invalidating clause is attached to the law.[25]

The discussion of Suárez is more largely concerned with a specious objection to the usual interpretation of the law of Justinian and with the time when the effect of a prohibitory law occurs. He likewise considers the force of custom as a factor

derogating from Justinian's law. Only Suárez' treatment of the objection to the usual interpretation of Justinian's law need be considered here.

The objection considered by Suárez[26] maintains that the law of Justinian merely punished fraudulent actions; that it did not invalidate acts performed contrary to the law in good faith. This objection was said to be supported by the first part of the text of the law of Justinian,[27] coupled with the extension of the law by Justinian to include "interpretations" of other laws rather than the laws themselves.[28] Thus Justinian's law could be used to invalidate any act contrary to law if this act were performed fraudulently. Otherwise, according to the usual interpretation, an act contrary to the law would not be considered invalid. Confirmatory argument was obtained by the assertion that Theodosius II merely meant to punish fraud.

Suárez denies the validity of this objection by showing that it is contrary to the intention of the legislator and contrary to the actual text of the law. He admits a specious validity which disappears upon investigation. The reply of Suárez to the objection concerning the scope of Justinian's law correctly analyzes the intention and the will of Justinian. The same reply meets the confirmatory argument found in the law of Theodosius II.

Suárez maintains correctly that the law of Justinian is based on the law of Theodosius II. The latter law was undoubtedly enacted because of some abuse. But Theodosius II did not stop with penalizing abuses. He enacted a law which controlled all acts contrary to his law, so that at least after his time fraud and open violation of the law would be equally punishable with invalidity.[29] Suárez shows that this is the only reasonable interpretation of the sentence beginning with the words *"nullum enim pactum."* Suárez then continues his argument, showing that Justinian thus understood the mind of Theodosius II. This argument is based on the fact that Justinian omitted mentioning the abuse against which Theodosius II ruled, but immediately after stigmatizing fraud proceeded to enact a law controlling every act con-

trary to his law. Thus not only fraud but also violations in good faith were subject to invalidity. Suárez does not mention contrary acts made in good faith, but he must necessarily include them as violations of law. The principle of law found in the text of Theodosius II and Justinian will also apply to non-malicious violations of the law since the mere non-compliance with the law results in invalidity. In this matter Suárez is inconsistent. He says that all violations of the law and not only fraudulent violations are included under the law of Justinian; yet he maintains later that this law is penal in nature.[30] Suárez would certainly maintain a violation of the law in good faith to be an invalid act, yet the invalidity imposed upon the act would not be in the nature of a penalty.

To the part of the objection which asserted that Justinian extended his law to include interpretations of other laws rather than the laws themselves, Suárez maintains that such an objection is overruled by another sentence in Justinian's law.[31] Suárez' position is in accord with the progressive enactment found in the law of Justinian. Taken by itself, the enactment grants retroactive force to the interpretations of old law, and equal force is conceded to new law. But, Justinian did not stop with this sentence. He continued by stating that it is sufficient to prohibit when the legislator does not want the act performed. This shows clearly that any prohibition is enough to invalidate an act.

Leurenius[32] also considered the law of Justinian. This consideration was made more from the viewpoint of canon law; it was not so much a study of the law itself. Leurenius does, however, offer some comment on the law of Justinian, and he concedes that acts contrary to a prohibitory law are invalid. He holds that violations of law are to be punished. The only violations he contemplates are malicious ones. Hence he says that even if an act is said to be null in law this invalidity must await the judgment of the court.[33] The decision is then retroactive. Leurenius does not consider the possibility of a violation of the law in good faith. Consequently, he must weigh every invalidity

as a penalty. He could say, then, that a declaration of crime is necessary before invalidity can be ascertained.[34] Leurenius took too narrow a view of invalidating laws; but if his interpretation of the law of Justinian is correct, his conclusion must be admitted. However, as was determined earlier,[35] an invalidating law is not necessarily penal in nature.

The invalidity of an act contrary to a prohibitory law is likewise asserted in canon law. It must be admitted, however, that canonical jurisprudence is not clear in actually determining the effect of a prohibitory law. There are some indications that a prohibitory law in canon law invalidates a contrary act, while other indications exist which deny such an effect.

In support of the invalidity of an act contrary to a prohibitory law a text of a letter of Pope Gregory I is offered: *"Imperiali constitutione aperte sancitum est, ut ea quae contra leges fiunt, non solum inutilia, sed etiam pro infectis habenda sint."*[36] Another text offered is a rule of law of Pope Boniface VIII: *"Quae contra ius fiunt debent utique pro infectis haberi."*[37]

These two texts are obviously based on the law of Justinian and are said to represent an adoption of Roman law by canon law. It is little wonder, then, that commentators who were greatly influenced by Roman law should interpret the above texts as indicating that any act contrary to a prohibitory law is invalid.

The text of Pope Gregory I is admittedly a statement of the law of Justinian. But, as Suárez proves,[38] it is only this and not an incorporation of Justinian's law into canon law. Pope Gregory I is citing a civil law to solve a civil problem. This problem concerned a testament of an abbess. The Pontiff declared against its validity in civil law. There is no real indication that Pope Gregory I had incorporated the civil law into canon law.

But if the text of Pope Gregory I can be understood readily, the same is not true concerning Rule 64 of Pope Boniface VIII. This rule was published with the decretals of Pope Boniface VIII and was cited in ecclesiastical courts. Consequently we can expect to find definite opinions in regard to its application.

Peckius,[39] for instance, commenting on Rule 64, takes a decided stand in favor of the invalidity of any act contrary to law. He admits that certain acts contrary to law are recognized as valid,[40] but he affirms that such acts should not be so recognized. Peckius says that the law never acts in vain.[41] He offers a number of observations indicating that he believes a prohibitory law to be always operative for the invalidity of contrary acts. He likewise is insistent that every act that does not fulfill the solemnities required by law is invalid. Further, he maintains that anything contrary to the mind of the legislator or any decision contrary to precedent is invalid.[42] Peckius also considers the possible necessity for a specific clause invalidating an act. He decides that such a clause is altogether unnecessary since every prohibitory law implicitly contains this clause.[43] This is the same opinion Barbosa held in regard to the law of Justinian.[44]

The doctrine of Peckius is undoubtedly severe and rigid, and it was not followed by most other canonists. Barbosa, however, while not commenting directly on Rule 64 of Pope Boniface VIII, is inclined to agree with Peckius. He states his opinion, relying on a decretal of Pope Boniface VIII[45] in which the Pontiff annuls every act performed after a reservation had been placed on a Cathedral benefice. This law contained an invalidating clause.[46] Barbosa uses this decretal in his explanation of the clause *decretum irritans*.[47] In his commentary on this clause, Barbosa states that it has the effect of invalidating any act contrary to it. He further states that even acts in good faith are included.

It is tempting to associate Barbosa with Peckius in maintaining that every act contrary to a prohibitory law is invalid. The doctrine of Peckius is clear and not open to misinterpretation, but Barbosa's doctrine is dependent on the fact that he cited the decretal of Pope Boniface VIII as supporting his doctrine. This decretal is not merely a prohibitory law. It is an invalidating law.

With the exception, principally, of Peckius, most commentators in canon law rejected the notion that a prohibitory law necessarily invalidates a contrary act. A specific invalidating clause

in the prohibitory law was required before it could produce this effect, they held. This contention did not include laws —e. g., those concerning testaments — which demanded special formalities or solemnities. These solemnities were in many instances reduced to conditions which had to be fulfilled before an act would be recognized in law as valid. Strykius, for instance,[48] maintains that even a slight defect of form would invalidate an act.

Pichler has perhaps the clearest statement relative to the force of a prohibitory law in canon law. He says that an act contrary to a prohibitory law which does not contain an invalidating clause is illicit but not invalid.[49] The arguments that Pichler uses are generally those proposed by all who hold the same opinion and are the same arguments which defend the present law in the Code. A review of these arguments will show how in canon law the interpretation of the force of a prohibitory law diverged from the interpretation of the same kind of law in Roman law.

Pichler offers these arguments to support his contention. The first argument is based on a decretal of Pope Innocent III; the second rests on the difference in meaning between the verbs *prohibere* and *irritare;* the third is based on a rule of law.

Naturally, the strongest argument Pichler could advance is the doctrine of Pope Innocent III. This doctrine is to be found in a letter of the Pope to the Archbishop of Pisa.[50] In his letter the Pontiff discusses the law regarding the time when monastic profession should be made. He says that profession should not be made before the proper time for probation has elapsed, but that it is a valid profession if it was made before this time had elapsed. The case, then, resolved itself into a violation of a prohibitory law. Profession was forbidden before a specified time for probation had elapsed. Pope Innocent III considered the violation of the law as actual, but he nonetheless declared the profession to be valid. The reason he assigned stands as the foundation for the doctrine that a prohibitory law in canon law does not necessarily

invalidate a contrary act. Pope Innocent said: *"Multa fieri prohibentur, quae, si facta fuerint, obtinent roboris firmitatem."*

The decision of Pope Innocent III is important not only because it clearly departs from the Roman law on the effect of prohibitory laws but also because it antedates Rule 64 of Pope Boniface VIII, which is the principal argument for the doctrine of Peckius.

Pope Innocent III did not state his reason for the validity of the monastic profession as something which he himself had introduced. Rather, he introduces this reason in a subordinate clause as something which was generally known. It is necessary to keep this in mind, for all too frequently canon law jurisprudence is assumed to be entirely dependent on Roman law. It is equally necessary to keep separate the developing jurisprudence of canon law and the continual thread of the influence of Roman law on canon law. A comparison of this decretal of Pope Innocent III with Rule 64 of Pope Boniface VIII shows that the former Pontiff is demonstrating the independence of canon law, while the latter Pontiff is adopting in canon law the jurisprudence of Roman law.

Pichler's second argument shows the difference between the verbs *prohibere* and *irritare.* This argument has validity only if the legislator has not clearly stated what he means by *prohibere.* In canon law, as Pichler correctly infers, the significance of these verbs must be judged from the dictionary, since the ecclesiastical legislator has not declared a broader meaning for the verb *prohibere.* This argument, of course, could not be used in Roman law, for Justinian said that he intended to invalidate when he prohibited an act.[51] In interpretation it is entirely proper to use the ordinary meaning of a word when its significance in law has not been extended or restricted. Consequently Pichler cannot be accused of quibbling.

The third argument of Pichler follows from a consideration of his second argument. To invalidate is graver than to prohibit. Using, then, the invalidation of an act as an effect more grave

than mere prohibition, Pichler employs Rule 15 of the Rules of Law of Pope Boniface VIII to show that invalidation should be restricted and not used interchangeably with prohibition.[52] This is a valid argument, for everything that is repugnant to the validity of an act should be demonstrated and not assumed. If an act is valid in natural law it can still be invalid in positive law, but such restriction is not to be assumed. It must be demonstrated. If, then, invalidation is considered as a greater restriction on one's natural right to act than a mere prohibition to act would be, such invalidation is far more odious. It should, then, be restricted. In other words, whenever invalidation of an act actually occurs, the act must be demonstrated as something more than illicit.

Besides offering argument for his own opinion, Pichler considers in detail the arguments suggested for the opinion that even in canon law a prohibitory law invalidates a contrary act. These arguments are set down by Pichler and answered by him.

The first objection considered by Pichler rests on the laws of Justinian.[53] Pichler answers this objection by maintaining that these laws are primarily to restrain acts contrary to good morals. Such acts should be punished with invalidity. Thus Pichler hints that he considers the laws of Justinian as penal laws.

The second objection is founded on the necessary subordination of the will of the subject to the will of the legislator. No time need be spent in proving the necessity of this. Pichler, however, claims that there is no lack of subordination if the legislator does not sufficiently indicate his will. In canon law the will of the legislator to invalidate when he only prohibits is not clearly indicated; therefore Pichler applies a principle of law[54] and maintains that the prohibition of an act is not necessarily its invalidation.

The third objection is fundamentally of moral character. It is stated that one should not profit by an evil act. Pichler could admit this objection as a moral principle, but he is obliged to refute it as a legal principle. He does so by maintaining that

some acts are recognized as valid even though they are forbidden. The examples he uses are from theology — e. g., the consecration of the host and the remission of sins by an unworthy priest.

The fourth objection is an attempt to turn the argument back on those who maintain that a specific clause is necessary to invalidate an act. This objection states that some acts merely prohibited in law are actually considered invalid. The example used is marriage between close relatives. In answering this objection, Pichler is obliged to show the force of custom. He does this nicely. Interpretations of some marriage laws have proceeded more in accordance with the presumed intention of the legislator than in accordance with the actual text of law. This interpretation has been used in regard to marriage between close relatives. Consequently, it is not so much that a prohibitory law actually invalidates from the force of its text but rather that the interpretation of the mind of the legislator has superseded the interpretation of the actual text. This is an excellent example showing how custom, through interpretation of a law, can induce a more serious effect than would be found by examination of the actual text of law. It is, however, a comparatively rare use of custom. Most customs will lessen the effect of law.

The fifth and final objection is an alleged comparison between natural law and positive law. It is asserted that natural law invalidates what it prohibits. Therefore, positive law should do the same. Pichler answers this objection by showing that natural law invalidates what it prohibits in only two cases. The first case is the attempt to perform an act without the capacity to do it — e. g., to give away something which is the property of another. The second case is the prohibition of an act which contains perpetual malice and turpitude — e. g., a pact to commit sin. These two cases naturally involve invalidation in their prohibition. Beyond these cases a prohibition in natural law is not necessarily an invalidation in natural law. Taking this very restricted invalidation in natural law as a basis, Pichler intimates that positive law prohibits many things which are beyond the scope of natural

invalidation, and therefore requires for invalidation something more than a mere prohibition.[55]

It will be readily appreciated that the attempt to compare natural and positive law in the way just indicated stems from a misunderstanding of the function of positive law. The latter, while dependent on the former, is more directly concerned with the welfare and order of society. Hence, prohibitory laws can exist which need not be invalidating in order that their purpose be achieved. The legislator can easily determine which prohibitory laws he wishes to enforce with invalidity. If he does not specify this effect, it can be presumed that he does not desire it. At the same time it must be remembered that this is the jurisprudence of canon law determined over a period of time. It is not the jurisprudence of Roman law.

Leurenius[56] likewise considers some of the objections answered by Pichler, but he also has a word to say about Rule 64 of the Rules of Law of Pope Boniface VIII. We shall consider Leurenius' doctrine later along with the doctrine of Suárez and Reiffenstuel.

To the objection that the will of the subject should be subordinated to the will of the legislator, Leurenius answers that when a prohibitory law is disobeyed there is no real need that the act be invalid in order to show that subordination is lacking. Leurenius says that insubordination is sufficiently shown by the dishonesty of the act. The very fact that the act is unlawful is enough to show that the will of the legislator is superior to the will of the subject. This is a good argument. All that is fundamentally necessary to demonstrate the superiority of the legislator's will is that a contrary act be illicit or unlawful. A more serious effect is actually beyond the fundamental meaning of a prohibitory law. But, again, it must be remembered that this is the jurisprudence of canon law, not Roman law.

Fagnanus[57] can also be cited as maintaining that a prohibitory law does not necessarily invalidate a contrary act. As examples he gives the laws regarding the publication of the banns of mar-

riage and the exploration of the will of novices before profession. These laws bind, indeed, but if they are disobeyed the act is not invalid. Moreover, Fagnanus says that when the Council of Trent wished to bind so that a contrary act would be invalid, it definitely stipulated this — e. g., in the case of clandestine marriage.[58] From this action of the Council of Trent, Fagnanus concludes that an invalidating clause is necessary before an act can be invalid.

After stating that it is the opinion of canonists that a prohibitory law requires an invalidating clause before it invalidates an act, Biner[59] supports this opinion by maintaining that natural law does not invalidate everything it forbids; therefore, canon law should not do so. This is the reverse of the fifth objection considered by Pichler. Pichler answered this objection by showing how limited was the application of natural law to the legal effect of acts. Biner assumes this limitation and proceeds to show that if so fundamental a law as natural law does not always invalidate when it prohibits an act, no laws built upon it should have of themselves a more serious legal effect. It is easy to see that Biner believes that an invalidating clause is necessary in order to produce the invalidity of acts that are contrary to a prohibitory law.

As usual Suárez can be expected to dwell in detail on the necessity of an invalidating clause before a prohibitory law can invalidate an act. Three chapters of Suárez' monumental work on laws are devoted to a consideration of the force of prohibitory laws.[60] In Chapter XXV Suárez discusses the actual meaning of a prohibitory law. He records the opinion of those who maintain the invalidating force of a prohibitory law. Their arguments are based on the interpretation of the law of Justinian, on the alleged inclusion of this law by Pope Gregory I, and on Rule 64 of Pope Boniface VIII.[61] In the same chapter, Suárez records an opinion which he rejects: that if no penalty is included in the law, the prohibitory law will invalidate an act. If a penalty is included, the prohibitory law will merely prohibit an act but will not invalidate it. This opinion is based on the belief that the legislator does not intend to put a twofold onus on the transgressor of his

law, namely, a penalty and the invalidity of the act. Therefore, if a penalty is included, the act is illicit but valid. If no penalty is imposed, the act is illicit and invalid.[62] Suárez rejects this opinion because he maintains that the imposition of a penalty is not sufficient indication that the prohibited act is invalid. In this same chapter Suárez explains his own opinion.

In Chapter XXVIII Suárez discusses the law of Justinian and considers the force of a prohibitory law in Roman law. Chapter XXIX is a consideration of the force of a prohibitory law in canon law.

As was just mentioned, Suárez' own opinion of the force of a prohibitory law in itself is found in Chapter XXIX.[63] This is a consideration of a prohibitory law independently of its use in Roman law or canon law. He admits that there are two ways in which a prohibitory law can be studied; first, by investigating its fundamental meaning; secondly, by investigating the amplification of this fundamental meaning through subsequent legislation which would constitute a general rule.[64] In Chapter XXV Suárez investigates merely the first of these two ways of considering a prohibitory law.

Suárez' opinion is that a prohibitory law does not of itself invalidate a contrary act. He arrives at this conclusion through the fact that the effect of a prohibitory law must be studied from its text. That an act is unlawful if performed contrary to law is evident, Suárez implies, because the legislator does not want that act to be performed.[65] This is all that the law signifies. Nothing more can be deduced from the fundamental meaning of a prohibitory law. Suárez knows that this conclusion is not held by all, but he maintains that his adversaries are influenced by the use of prohibitory laws in systems of positive law.

Moreover, Suárez maintains that the prohibition of an act and its invalidation are two distinct and separate legal effects. If both effects are to be included in a prohibitory law, both should be sufficiently indicated. Where the prohibition of an act is indicated, performing the act prohibited will be unlawful; where

invalidation of an act is indicated, any act contrary to the law will be invalid. These effects are separable and must be separately indicated in the law. As an example of an unlawful but valid act, Suárez mentions an illicit but valid ordination.[66]

Suárez is not satisfied with maintaining that the possible twofold effect of a prohibitory law should be separately indicated by the legislator; he also strengthens his position by declaring that the invalidation of an act is odious and must not be presumed. To support his position Suárez relies on the application of two Rules of Law of Pope Boniface VIII.[67] In applying these two rules Suárez says that it cannot be doubted that the legislator could have indicated his intention more clearly in a prohibitory law if he wanted also to invalidate contrary acts. Therefore, at most invalidation of an act is doubtful if no invalidating clause be found in the law. It is correct, then, Suárez says, to maintain the minimum effect of a prohibitory law rather than its maximum effect.

Suárez also considers the favorite objection to his opinion; namely, that the will of the subject should not be preferred to the will of the legislator. This objection has already been considered, but it is worth while to note that Suárez patiently examines it and refutes it by indicating wherein resistance to the legislator's will is to be found. If the law prohibits an act, a contrary act is unlawful and sinful; if the law invalidates an act, a contrary act is invalid. This answer to the objection does not depart from the usual reply to it.[68]

Suárez' arguments are clear and persuasive. It is necessary to have a definite grasp of the theory of law, the right of the legislator to enact laws, and also his duty to specify the effect of his laws. As a legislator a Superior cannot make his law more operative than his words indicate. Consequently the effect of a prohibitory law is to be deduced from its text. Suárez correctly maintains that a prohibitory law of itself merely prohibits. It does not invalidate an act.

Using his discussion of the theory of a prohibitory law as a basis in his consideration of the difference between prohibitory laws in the two principal systems of law, Roman law and canon law, Suárez interprets a prohibitory law in Roman law as also invalidating an act, while holding that in canon law such an effect is not demonstrated.

In Chapter XXVIII Suárez discusses the effect of a prohibitory law in Roman law. He had maintained in his discussion on the theory of prohibitory law that if the legislator wished to invalidate when he prohibited an act, he should specify this effect of his law. And he found that the laws of Theodosius II and Justinian do specify this effect. Hence Suárez freely admits that in Roman law a prohibitory law also invalidated a contrary act.

In a parallel discussion of the effect of a prohibitory law in canon law Suárez finds no such clear indication of the will of the legislator.[69] He considers the arguments for the simultaneous prohibition and invalidation of acts in canon law and finds that these arguments are either inappropriate or are a repetition of the Roman law. Suárez maintains that there is no text of canon law which assigns a greater force than unlawfulness to an act contrary to a prohibitory law. He concludes, then, that in canon law a prohibitory law does not, without a specific clause, invalidate an act.

Reiffenstuel's opinion of the force of a prohibitory law is almost exclusively based on the application of such laws in canon law. His opinion is to be found in his treatise on the Rules of Law of Pope Boniface VIII.[70] Reiffenstuel mentions that there are two opinions regarding Rule 64.[71] The first is based on the law of Justinian and the decision of Pope Gregory I; the second is founded on the decretal of Innocent III. The latter opinion, Reiffenstuel states, is the common one. He upholds this opinion not with the sustained energy of Suárez but by citing examples in which prohibitory laws did not invalidate. These examples are taken from the decretals.[72] He also cites the Decree of Gratian.[73]

Reiffenstuel's important contribution to this discussion of the effect of a prohibitory law is his restatement of Rule 64 of Pope Boniface VIII. He says that the true meaning of this rule is: Whatever is done contrary to law — that is, contrary to a law which invalidates an act or demands some substantial form — is invalid.[74]

Leurenius[75] also briefly discusses the force of a prohibitory law in his study of Rule 64 of the Rules of Pope Boniface VIII. Leurenius is inclined to think that this rule means that acts contrary to law can be annulled. However, this is an afterthought with Leurenius. He feels that the first application of this rule is to the formalities and solemnities required for certain acts. An act which does not fulfill a formality or is not adorned with the solemnity required in law is invalid. These formalities and solemnities, then, can be considered as necessary conditions.

At this time it is useful to see the rules Zallinger offers to aid in the interpretation of invalidating laws.[76] The application of these rules will perhaps not be admitted by all canonists, but Zallinger himself thought that they would apply to all invalidating laws. A discussion of the laws will reveal their possible application.

Zallinger's first rule for the interpretation of invalidating laws states that an invalidating law has its effect in both fora.[77] The force of this rule is sought in the power of the legislator. Unless the legislator specifies that one or the other forum only is to be considered, the invalidity of the act in both fora must be maintained. This rule is sound in itself but will receive less application when the invalidity of an act can be demonstrated to be a penalty to be inflicted by a judge. However, if the law itself prescribes immediate invalidity (even though this invalidity be a penalty), Zallinger's rule is applicable.

Zallinger's second rule urges an investigation of the text of the law in order to see exactly what is invalidated.[78] This rule has force whenever the effects of an act are separable. The legislator may not wish to invalidate every effect of an act. Therefore,

in a particular case some effects of an act may be invalid; others may remain intact by reason of divine or natural law.

Zallinger's third rule emphasizes the force of an invalidating law even if one is ignorant of this law, or even if one needs power to act.[79] The application of this rule is almost universal. Neither good faith nor the necessity to act is an excuse exempting from the force of an invalidating law. A possible exception may be found in invalidating laws that are primarily penal.

The preceding pages have principally considered the force of a prohibitory law in its relation to the possible invalidation of an act. A few lines of summary will not be out of place since the same summary can serve as a partial explanation of canon 11, which sets forth the principle according to which invalidating laws may be recognized in canon law.

It has been demonstrated that a prohibitory law of itself can only prohibit. No further and necessary effect can be deduced from its fundamental meaning. This is primarily theory, but it is necessary to know this. However, a law cannot well be studied outside the legal system of which it is a part. Hence the force of a law will depend not only on its fundamental meaning but also on the technical significance given to it by the legislator. Similar dependence will be found in doctrinal interpretation. If, then, a prohibitory law in Roman law be studied, it must be admitted that such a law also invalidated an act even without a specific invalidating clause. This is clear from the texts of the laws of Theodosius II and Justinian. If, on the other hand, a prohibitory law in the system of canon law be studied, no such clear texts are available. There are, however, texts supporting conflicting opinions. Those who held the stricter interpretation of a prohibitory law were influenced, it must be admitted, by Roman law. The weight of opinion, however, and the better arguments are not in favor of their judgment. The common opinion that was eventually established concerning the force of a prohibitory law was that it did not invalidate an act unless this effect was expressly or equivalently stated in the law. This opinion is now explicitly in-

corporated in the Law of the Code of Canon Law. Hence, after centuries, the Code of Canon Law definitely views a prohibitory law differently than did Roman law.

The interpretation of invalidating laws is not concluded with the study of the force of a prohibitory law. In canon 11 the Code of Canon Law mentions that invalidating laws can be identified not only by an expressly invalidating clause but also by an equivalent clause. The apparent meaning of "equivalent clause" is not difficult to grasp. It means that such a clause must equal in intensity the force of an "expressly invalidating clause." This eliminates any implicit invalidation, but it would not necessarily eliminate indirect invalidation. A positive law, for instance, which demands certain formalities is *indirectly* an invalidating law, and the clauses which state the necessary formalities are *indirectly* invalidating clauses. It may be somewhat confusing to use the terms "direct" and "indirect" invalidation, but such expressions are customarily employed.[80] The important thing is to understand how an invalidating law operates: whether it operates directly — e. g., by invalidating an act; or indirectly — e. g., by establishing a definite form for the act to take.

But if indirect invalidation is included in canon 11, implicit invalidation is not. Implicit invalidation is the result of ratiocination and cannot be arrived at without deduction. Such invalidation is not recognized in canon 11.

The actual difference, then, between indirect and implicit invalidation is important. The former is a restatement of the law itself; the latter is a deduction from the law. The knowledge of this difference is not only important for actual use; it is important also for the study of the doctrine of earlier canonists[81] who use the word *implicita* where they actually mean indirect invalidation.

In regard to the true meaning of an "equivalent clause" in canon 11, there is even today no agreement. Some canonists cited by Van Hove,[82] understand by this a law which requires formalities or solemnities with an act in order for it to be valid; while

others, also cited by Van Hove,[83] demand a law bearing a clause which conveys the same meaning as, or makes actual use of, the word *expresse.* Van Hove himself is of the latter opinion.[84] He believes that the word *aequivalenter* was inserted in canon 11 in order to eliminate the uncertainty which, he alleges, existed in the old law. Hence he rejects the inclusion in canon 11 of laws which demand formalities.

Van Hove's position is not entirely acceptable. He maintains that his opponents understand these latter laws as implicit invalidation, which he rightly thinks is not considered in the present law. Maroto, however,[85] gives no indication that he so understands canon 11. Maroto merely adopts the doctrine taught earlier — by Reiffenstuel, for example — without using the same terminology.[86]

In the attempt to arrive at a proper interpretation of the word *aequivalenter* in canon 11, there is no reason to exclude any interpretation which can and does fulfill the meaning of this word. The meaning of *aequivalenter* certainly is not restricted to include only a clause which conveys exactly the same meaning as the word *expresse.* Obviously a clause which has such a meaning is an equivalent clause, but this need not be the entire scope of the word *aequivalenter.* A law which is so framed that its violation results in invalidity is certainly an invalidating law and would fall under canon 11. In this case the whole phrasing of the law is equivalent to an express invalidation. Consequently it is better to say that any kind of equivalent invalidation is controlled by canon 11. This would include all clauses which mean the same thing as express invalidation and likewise include all laws which for validity demand formalities or solemnities.

Two subjects, then, could be considered in this part of the study of invalidating laws. It may be better, however, to consider equivalent clauses in the chapter on the identification of invalidating laws and restrict ourselves here to a discussion of the formalities required by law for certain acts. This discussion will

consider the necessity of these formalities and attempt to determine whether their omission will always invalidate an act.

There is no doubt that a rigid interpretation of the formalities required by law must lead one to maintain the absolute necessity of complying with them in order to act validly. In demanding certain formalities, the legislator is understood to expect a compliance with them. Anything short of complete compliance with the law is insufficient for validity. Since invalidity of the act is not stipulated as a penalty for the transgression of the law, such invalidity would occur even if, through ignorance or error, the formalities of the law were omitted in whole or in part. This was the doctrine of Strykius.[87]

The same absolute necessity for the observance of formalities, or the form of the act, is maintained by Covarruvias. His doctrine is in regard to Roman law, but the same principle had been employed in canon law. The specific case Covarruvias considered was the validity of a codicil. He maintained that the only standard for judging the validity of the codicil was to compare it with the requirements of law. The codicil in question was devoid of some formalities. To judge its validity, it would be necessary to compare it with the requirements of law. If the absent formalities, while in themselves useful and acting as a preventive of fraud, were not really demanded by law, the codicil would be valid.[88] Covarruvias recognized the right of the legislator to impose a definite form of act before recognizing the act as valid. While Covarruvias wrote specifically of Roman law, the principle upon which he relied is equally applicable to canon law. The principle of law states that one's capacity to act and his manner of acting are under the control of law.[89]

Altimarus[90] can also be cited as teaching the absolute necessity for observing the specified form of an act. He says without any qualification that nullity results from a defect of an act. Such a defect would be found in the omission of prescribed formalities.

Reiffenstuel maintains that the omission of the substantial form of an act will render the act invalid. He says that this is not

controverted. He mentions nothing at all about the omission of details or accidental form.[91] As his authority for the statement that omission of the substantial form will invalidate an act Reiffenstuel cites several decretals,[92] as well as the entire section of the Decretals on Testaments.[93]

Suárez devotes two chapters in his work on laws to a consideration of the form of an act.[94] In the first of these chapters he analyzes a number of rules which might control the efficacy of an act performed contrary to law. In the second of these chapters Suárez considers the possible force of a clause which might be interpreted as penal.

There is no need to follow Suárez in his long and detailed analysis of the various rules offered for judging the validity of an act. But what is important is Suárez' account of how to consider the imposition of a certain form.[95]

Suárez distinguishes between a form specified by law in the actual concession of power and a form also specified by law but presupposing that power is actually possessed, not merely conceded. In the first case, the form is so specified that its neglect will invalidate an act. The same invalidity would not occur in the latter case. This distinction is important. If a person, Suárez says, exercises delegated powers, he must exercise them in the way indicated; otherwise the act will be invalid. If, however, a bishop should not observe the form required in fulminating an excommunication, the penalty would nonetheless be inflicted since his act is valid. These are the examples which Suárez uses to show the difference between substantial and accidental form.

In support of his contention that the form of an act can be substantial, Suárez cites a decretal of Pope Innocent III.[96] In this decretal the Pontiff had imposed a definite manner in which his delegate should act. This form had been neglected and the Pontiff annulled the act.[97] It is to be noted that in this decretal power had been given by means of delegation. Hence in the actual concession of this power, certain stipulations were made. The conclusion is that such power could be exercised only in the

way in which the grantor had conceded it. In other words, the power delegated and the manner in which it should be exercised were one item. A disregard, therefore, of the manner in which the power was to be exercised, inevitably invalidated the conceded power itself. No specific invalidating clause would be necessary, because the power exercised had been conceded for use in a specific way. Suárez stresses this thought because there is in delegation a limitation of power.

Again, it must be remembered that Suárez is discussing the jurisprudence of his time. It is possible that such jurisprudence, since it does not rest on any immutable principle of law, may change, so that the manner of exercising delegated power may no longer be considered as juridically bound up with its actual exercise. The rule always remains, however, that the manner of acting *may* be prescribed for validity, but in regard to this presumption the law can well be altered. This is done in the Code of Canon Law.[98]

Suárez' explanation of the validity of an act when an accidental form is neglected, is equally clear. He considers this accidental form as something superimposed on the actual possession of power. The assumption, then, is that a person already possesses power but is obliged by law to exercise it in a certain way. The example Suárez uses is suitable. A bishop possesses power to excommunicate. He possesses this power by virtue of his office. Nevertheless there are certain formalities or solemnities which by law should be fulfilled or employed. Suárez maintains that if a bishop neglects these formalities or solemnities, he still excommunicates validly. This is, of course, stated on the assumption that these formalities or solemnities are not prescribed definitely for validity. If such should be the case, Suárez' example is not suitable.

Suárez' statement concerning the validity of an act notwithstanding a defect of accidental form is supported by a law of the Council of Lyons held under Pope Innocent IV.[99] This law prescribed that a decree of excommunication should be given in

writing and that the reason for the penalty should be indicated. If these formalities were not heeded, their neglect would be punished and the sentence of excommunication might even be revoked. This law did not invalidate the sentence of excommunication, but it did demand that certain formalities should, under penalty, be observed.

Suárez correctly analyzes this law of the Council of Lyons. There is no indication in the law that any intrinsic limitation of power is imposed by the requirement of formalities. In fact, the sentence of excommunication is presupposed as valid, although it could easily be revoked.

The two examples cited by Suárez provide an interesting contrast: that is, the case of the delegation of power in the decree of Innocent III, where the form of an act was bound up with the concession of power; and the example of the accidental form required by the Council of Lyons for a sentence of excommunication. In both instances formalities were imposed which should be fulfilled. Yet the neglect of the formalities laid down by Pope Innocent III produced invalidity, while the formalities laid down by the Council of Lyons do not obtain that effect. Consequently, aside from an actual invalidating clause, formalities as such in the law of the decretals did not necessarily bind for validity. The reason, then, that Pope Innocent III could say that neglect of the formalities invalidated an act, while a similar statement is lacking in the law of the Council of Lyons, would have to be sought in the nature of the power exercised. When this point is examined, wide divergence is found. The delegate of Pope Innocent III possessed power not by virtue of office but by the concession of his Superior. The judge who excommunicated according to the law of the Council of Lyons already possessed the necessary power to act, by virtue of his office. The former's actual power was limited in its concession; the latter's power was not limited by concession.

The practical effects of this distinction cannot be denied. But these are the result of decretal law and are not necessarily un-

alterable. The present law of the Code of Canon Law is milder,[100] and does not consider the manner in which delegated power is exercised as of first importance. Kearney, for instance, says: "Ordinarily the delegate is obliged to execute his mandate in the manner prescribed by the delegator. If he does not, he acts illicitly but validly, since the delegator is not presumed to decree a particular method of execution under the penalty of invalidity. The delegator may, however, so ordain. In this case the manner of executing the mandate is a *condition* required for validity."[101]

There is great satisfaction in realizing that the present law of the Code of Canon Law has definitely and clearly indicated how the formalities enjoined in the issuance of delegated power are to be weighed. The discussion of Suárez is an able dissertation on the reflex principles which underlie delegation, but the application of this principle was not always easy to determine, nor could knowledge of this principle always be assumed.

After discussing the fundamental difference between defects of substantial and accidental form, Suárez proceeds to weigh the effect of an invalidating clause.[102] It would seem that the presence of such a clause would always militate for the invalidity of a contrary act. Suárez, however, while admitting that such a clause is not necessarily penal, maintains that it can be penal and therefore must be judged as a penalty.[103] His reasoning is logical if such a penal clause is admitted. But the difficulty will be in determining when the invalidating clause is penal. Normally it would be expected that an invalidating clause concerning the form of an act would have direct reference to the act itself. In matters where power is delegated this would be almost universally so. While it is not easy to believe that the grantor of the delegated power would wish to penalize the beneficiary of his bounty because of the fault of his delegate, the entire process must be considered as one item, and the defect of one part would, according to Pope Innocent III, invalidate the entire process. To say, then, that an invalidating clause may be penal, so that the ministry of the delegation itself would be seemingly valid while the delegate

could be punished for negligence, would involve a contradiction in the meaning of the substantial form of such an act. Pope Innocent III maintained that the form of such an act is substantial and that neglect of the form would result in invalidity. The delegate can, of course, be punished for his negligence, but the ministry of his delegation would still be invalid, because incomplete. There is scarcely an opportunity here to consider an invalidating clause as penal.

In support of his contention that an invalidating clause concerning the necessary formalities can be penal, Suárez cites a decretal of Pope Alexander III.[104] In this decretal the Pontiff reprimands the Patriarch of Jerusalem for neglecting to ask the counsel of his chapter. The Pope annuls acts performed in such a way. While the first glance at this decretal would seem to indicate that because of an abuse the Pontiff will annul acts, further consideration reveals that in this case the acts so committed are already annulled.[105] Pope Alexander III, then, is merely applying an already existing law to the case before him. What the Pontiff actually does is to weigh the act against the requirements of law and declare that the form of the law is not completed. It is, therefore, an invalid act. It should not be said that the invalidity of the act is a penalty. Rather, it should be maintained that Pope Alexander III is insisting that the act be performed according to law. This law had been introduced to safeguard administration, and its neglect would result in public harm. The same idea of fostering good and efficient administration is to be found today in the Code of Canon Law.[106]

The third and last point to be investigated in this chapter is a study of the presumption which supports invalidating laws. It is important to know whether an invalidating law is based on the presumption of fact or on a presumption of law. If the invalidating law is founded upon the presumption of fact, disproof of the fact would render the law non-obligatory. However, if the invalidating law is founded upon a presumption of law, the enactment would remain obligatory even if actual fraud did not exist.

In order to determine what presumption supports invalidating laws, it is necessary to recall the purpose for which these laws are enacted. It is true that some invalidating laws are enacted for the purpose of punishing crime. In such cases, the obligation to observe the law is founded ultimately upon the existence of crime. Therefore, if crime does not exist, the law is inoperative. There is no intention on the part of the legislator to punish unless a punishable act is committed. This exemplifies presumption of fact.

On the other hand, many invalidating laws are enacted not to punish crime but to safeguard the welfare of society and its members. Such a safeguard will be frequently introduced to obviate the danger of something which could actually harm society and its members. The existence of this danger is to be found in the ill-ordered desires and ambitions of some men, in their frequently unscrupulous actions, and in their cool disregard for the welfare of others. Since such men make up part of a community and since their influence is always to be feared, it is entirely proper that what is called a presumption of law should arise to obviate their dangerous actions and influence. But in such a presumption no attention is paid to the actual *existence* of evil actions or undue influence. It is sufficient that the *danger* of such actions or influence be considered as existing. Herein lies the fundamental difference between a law based on the presumption of fact and one based on the presumption of law.

What kind of presumption underlies canon 11 of the Code of Canon Law? If, first of all, a distinction be made between laws which demand formalities or solemnities in order for acts to be valid, and laws which directly invalidate an act or declare a person legally incompetent to act, it will be readily seen that the former are established primarily to guard society against dangers and are therefore based on a presumption of law. If, for instance, a certain age[107] is required before one can be admitted to a novitiate, this formality is necessary to ensure the fact that the candidate is acting with sufficient reflection. Should such sufficient

reflection actually be possessed before the age determined by law, the formality must nevertheless be fulfilled. Experience has taught that insufficient reflection has, in the past at least, caused candidates to enter religion. The danger of such insufficient reflection is always present, although in a particular case sufficient reflection may actually be present. Another instance where the requirements of law must be met is the law governing the form of marriage.[108] This law is introduced to prevent clandestine marriages, because such marriages would not be open to the challenge of possible impediments. Another reason is that marriage is a public act, and it is reasonable to require that it be celebrated publicly. The solemnities stipulated in the law establishing the form of marriage are introduced to safeguard the sanctity of marriage and to assure its publicity. This safeguard is based on the possibility of improper marriages. This possibility is always present; and, consequently, even if the marriage contract is otherwise legitimate, the law must be observed. This is, again, a presumption of law. All invalidating laws which demand formalities or solemnities in order that an act be valid will fall under this classification.

If, in invalidating laws, a further distinction be made and attention be centered on laws which penalize crime, it is obvious that such invalidating laws depend on a presumption of fact. A simoniacal contract in canon law is punished with invalidity.[109] This law presumes that the crime of simony exists. It does not operate unless such crime does exist. Consequently, anything which would disprove the crime of simony would prevent the operation of the law. Further, since crime is involved, everything which would ordinarily be required for proof of crime, is required here likewise before the law operates. This, of course, is not specifically stated in every law which invalidates an act because of crime. But it is the theory according to which such a law is enacted.

It is not a presumption of fact, however, which supports invalidating laws that directly invalidate an act or disqualify a

person from acting legally for reasons other than crime. Such laws may be introduced to protect the common welfare or to safeguard a state of life. They rest on the presumption that dangers exist which could harm the common welfare or reflect on the dignity of a state of life. Such dangers are, in particular instances, independent of actual deeds. Inference as to the existence of these dangers when invalidating laws are formulated constitutes a presumption of law. Such invalidating laws are operative even if the dangers described are, in a specific case, non-existent.

Most invalidating laws, then, must be interpreted according to the wording of canon 21 of the Code of Canon Law.[110] This is the common teaching of canonists, as, for instance, Michiels.[111] For all practical purposes it is the same doctrine as that of Suárez, who criticized the opposite opinion severely.[112]

Granted that invalidating laws, exclusive of penal invalidation, are always operative, the question may still arise as to whether epicheia can be used.

Suárez[113] considers this point at length and maintains that epicheia cannot be used. He argues that epicheia does excuse from the obligation to observe a law, but it does not grant power to act where this power has been curtailed by law. In effect, Suárez says that release from the prohibitory feature of the law might result from epicheia but that some positive act of the legislator himself would be necessary to restore the power to act.[114] This distinction, which amounts to a distinction between prohibition and invalidation in the same law, is rightly criticized by Van Hove.[115] It is because of the prohibition that invalidation results. If the prohibition be removed by epicheia, the invalidation would likewise cease. Van Hove proves that this is the correct view of the use of epicheia in regard to invalidating laws. He says that an act prohibited by positive law is valid by the law of nature, and if the obligation of positive law be removed, the natural effect of an act must be recognized. Of course, if the act is invalid in natural law no use of epicheia is possible.

Van Hove, perhaps, gives the best explanation of the use of epicheia in regard to invalidating laws.[116] This author distinguishes between laws which, when judged by epicheia, are beyond the power of the legislator, and laws which, while within the power of the legislator, might be interpreted benevolently.

The use of epicheia is always an individual matter. Its force is to be found in the reasonable supposition that the legislator does not wish to bind his subjects in extreme and unforeseen circumstances. And Van Hove maintains that these circumstances can actually place the action contemplated by the law beyond the power of the legislator. In such an instance, Van Hove says, an invalidating law will not be operative. This must be admitted, for if the circumstances do render the legislator incapable of enacting a law, he is powerless to act and his previous law cannot bind.

Van Hove, however, is careful to point out that it is far more difficult to use epicheia in extreme circumstances when the matter of the law remains within the power of the legislator. He does not deny the use of epicheia in such circumstances, but he says that it can be admitted only for the gravest of reasons. For practical purposes this would amount to a denial of the use of epicheia.

That it should be difficult to use epicheia in matters that remain within the competence of the legislator is seen as right when one remembers that an invalidating law is of itself a matter of grave importance. It must be assumed that the legislator has carefully and long considered the effect of his law not only in ordinary circumstances but also in such extraordinary circumstances as he could foresee. Consequently his intention of releasing from the obligation of an invalidating law should not be lightly interpreted.[117]

## Chapter V

# THE EFFECT AND OBLIGATION OF INVALIDATING LAWS

AMONG the several matters to be discussed in this chapter the principal point is the time when an invalidating law takes effect. It will be remembered that an invalidating law may be a penalty, although usually it is not; it will also be remembered that the establishing of an invalidating law depends on the will of the legislator. The time when an invalidating law will take effect will therefore depend on the character of such a law and, more fundamentally, on the time when the legislator desires such an effect to occur.

Closely allied to this question is the determination of the forum, or even the determination whether an invalidating law will produce its effect in both fora. Much of the discussion of the actual obligation of an invalidating law in the internal forum is superfluous as far as canon law is concerned. Such a question is settled, together with the question of the binding power of all other ecclesiastical laws, in the usual treatise on the power of the Church to enact laws.[1] Hence there will be no need to dwell at length on the fact that an invalidating law can bind in the internal forum. This is assumed as being proved and accepted.

The question as to when an invalidating law takes effect is important. It is possible that the law may stipulate immediate effect in the internal forum, so that the act is immediately invalid. It is also possible, especially if one follows the usual division of invalidating laws, for such a law to require a declaration of invalidity before the act need be considered invalid. It is further possible that if the invalidating law is penal no effect at all may be produced until the crime which invokes the invalidating law is proved and sentence upon it passed.

If everyone admitted that an invalidating law is one which immediately produces its effect, the discussion of the time when such a law would produce its effect would be greatly simplified. This would, of course, entail reducing a number of alleged invalidating laws to enactments which rescind acts rather than invalidate them. Such a simplification is not commonly admitted either by modern canonists or by earlier authors.[2] Hence it is necessary to study the effect of an invalidating law both according to its simplest definition and according to the classifications usually offered by canonists.

Reduced to its simplest terms, an invalidating law will immediately produce its effect. Such a law will indicate that the act contrary to it is invalid or that the person disqualified by the law is unable to act legally. The application of such an invalidating law requires no decision or even declaration of a judge to produce invalidation. Such was the force of the laws of Theodosius II and Justinian. Their laws specifically stated that no special clause was necessary for invalidation.[3] These laws were also clear in not requiring a judicial declaration or sentence before the act could be considered invalid. Both Theodosius II and Justinian order that the act contrary to law be accounted worthless.[4] No provision is made for judicial review of the prohibited act. Nor would it be legitimate to read such a provision into the laws of Theodosius II and Justinian. Their laws are so definite in establishing contrary acts as invalid that to employ the ministry of the court in applying these laws would be superfluous. A disputed act might well be reviewed to learn whether it is actually contrary to law; but if this act were already established there would be no need, in Roman law, to declare the act as established or to judge it as actually contemplated by the law. Suárez,[5] however, maintained that a judicial review of the act would be required. He based his contention on the plea that a criminal act would be involved.

An act contrary to an invalidating law is invalid in both the internal and the external forum. No excuse of ignorance or good

faith will impede the effect of the law,[6] unless such an excuse is already admitted by the law itself. Such immediate application of an invalidating law will be found frequently where no penalty is involved. A bishop, for instance, who has accepted a resignation from office, cannot confer this office on his own or on the resigning official's close relatives.[7] The application of this law does not involve a penalty for the relatives of the bishop or of the official who has resigned. Consequently, in order for this law to operate, it is not even necessary for a declaration of invalidity to be made.

If, however, the non-penal invalidating law should demand a declaration of invalidity, its effect would not be produced before the declaration had been made. Such a non-penal invalidating law would be exceptional. But it could occur, since the time of the effect depends on the will of the legislator. Such a law, however, should be carefully distinguished from a law which assumes a valid but rescindable act. Van Hove speaks of a *nullitas latae sententiae*[8] where the invalidity of an act is indeed determined by law, but where the effect of invalidity depends on a judge's declaration.

A penal invalidating law will naturally follow the jurisprudence of penalties. Hence, if the law demands a judge's sentence before the penalty can be inflicted, the effect of invalidation will be suspended. If, however, the penalty is inflicted by the law itself, the effect is produced immediately in both fora.[9] Nevertheless, until a declaratory sentence is passed, this penalty need not be observed if it cannot be observed without betrayal of oneself; and, in the external forum, its observance cannot be demanded, provided the crime is not notorious.

The foregoing explanation is occupied principally with prohibitory laws. However, laws which demand definite formalities or solemnities can also invalidate contrary acts. Such laws frequently demand minute observance. While a distinction between substantial and accidental form must be admitted, the invalidity of the act, once it is demonstrated by the neglect of the proper

form, will be immediately effective in both fora. The question here is not so much to determine in which forum or when the act is invalid, but to determine whether the substantial or the accidental form has been neglected. Should doubt arise as to whether the form neglected is accidental or substantial, the act, before its adjudication, must be considered valid. Invalidation of an act is never to be presumed.

Canonists[10] who divide invalidating laws into laws which invalidate an act immediately or immediately disqualify a person from acting and laws which require a judge's decision for invalidity distinguish likewise between immediate invalidation and subsequent judicial invalidation. It must not be thought that in the laws requiring a judicial decision no invalidation is contained in the text of the law. It is precisely this existence of an invalidating clause which does set these laws off from laws which merely permit rescissory actions.[11] This difference is, of course, admitted, but the resemblance is so close in practice that making any such division was criticized earlier.[12] Since, however, this division is taught, an examination of its statement on the time when an invalidating law takes effect must be made.

All canonists who teach this division in order to explain the operation of an invalidating law must distinguish several stages. Michiels does this openly.[13] In his consideration of a law which requires a judge's decision for the invalidity of an act, Michiels says the first stage of the law (*in actu primo*) establishes invalidity; the second stage (*in actu secundo*) is the judicial application of this invalidity. In other words, the law demands that the judge annul the act. It leaves the judge no option. The obvious conclusion from this is that the act, although contrary to an invalidating law, is considered valid in both fora until adjudged invalid. Such operation of an invalidating law is evident in penal invalidation, but it is not so easily seen in non-penal invalidation. It is true that whenever a judge applies a penalty by condemnatory sentence the effect of the law which he applies is suspended until the sentence is pronounced. There is no reason why a penal

invalidating law should be otherwise considered. But what if the invalidating law is not penal but introduced for the welfare of the society or its members? To say, then, that the act contrary to law is considered valid until a judge decides otherwise means that the beneficiary of the act contrary to law can meanwhile enjoy the fruits of the act. Of course, the judge's decision will be retroactive, but by the time it is given the fruits of the act may have disappeared or have been consumed. To assess for damages will not always meet the situation. Besides, if the act is to be considered valid in both fora until contrary sentence is pronounced, it gives the beneficiary some small title to benefit in justice. The only way to meet this objection would be to say that the act is provisionally valid and that the benefit is therefore provisional. Such an answer, however, will not restore the fruits of the act which are already consumed or fruits which have already disappeared. These fruits, it must be conceded, were not properly the effect of the law.

Because of this difficulty, it is asserted here, as well as earlier,[14] that non-penal laws which order a judge to invalidate an act should rather be considered rescissory laws. Michiels himself sees the difficulty and admits that rescissory laws may be compared to invalidating laws.[15] But, in saying this, Michiels reverses the comparison. If the effect of the law be considered, such non-penal invalidating laws are more like rescissory laws than rescissory laws are like invalidating laws taken as a whole. This is stated because in general the first and fundamental effect of an invalidating law is to invalidate; the first and fundamental effect of a rescissory law is to rescind. The latter effect — that of rescinding acts — is clearly and demonstrably maintained in law and can be sought only in regard to acts which are beyond question valid. The former effect — that of invalidating — is, however, only deductively provable in the non-penal laws under consideration. If an act contrary to an invalidating law can be actually valid, even for a time, provisionally, the effect of invalidation cannot in this instance be the first and fundamental effect. Therefore, it is better to say

that non-penal invalidating laws requiring a judge's decision for invalidity closely resemble and can be compared to rescissory laws than to make the reverse comparison between rescissory laws and invalidating laws in general.

Maroto[16] agrees with Michiels' comparison. He states briefly that an invalidating law which depends for its operation on the judge's decision (*ferendae sententiae*) and a rescissory law both operate only after the judge has invalidated or rescinded the act. Meanwhile, Maroto says, the acts are valid and produce their effect.

Van Hove[17] holds a similar opinion of such invalidating laws as have been discussed. He is careful, however, to note that such a sentence is not retroactive. If this is true, there is scarcely any difference between such an invalidating law and a rescissory law. Van Hove proceeds to say that the nullity of an act is altogether different than its rescindability. This is, of course, admitted by all; but if it is true that the condemnatory sentence required by an invalidating law is not retroactive, such a law will produce even less effect than a rescissory law. An anomalous situation would thus be created. A rescissory law is retroactive in its action in regard to a valid act performed within the law; yet an invalidating law would go so far as to preserve the fruits of an act said to be valid, but performed contrary to the law. The same anomalous situation is not created when only future penal invalidations, or future penal disqualifications constitute the judge's sentence. Thus, in canon 2346, a cleric who converts ecclesiastical property to his own use is to be punished with a disqualification for any benefice. This penalty is not retroactive, although through another penalty the cleric is also to be deprived of the benefice he may actually possess.[18]

The opinion of Michiels and Maroto is not new. Reiffenstuel, for instance, also taught that some invalidating laws do not produce their effect until a judge's decision is pronounced. In the meantime, the act is valid.[19] Reiffenstuel based his doctrine on a decretal of Pope Innocent III.[20] This decretal closes with the

statement that "many things are patiently tolerated which ought not to be so regarded in justice if the matter is brought to court."[21] It is difficult to concede that this decretal of Pope Innocent III supports the doctrine of Reiffenstuel. The case discussed in the decretal was a flagrant violation of an invalidating law regarding rescripts. The Pontiff nowhere in the decretal says that the act contrary to the invalidating law is valid. On the other hand he specifically states that the rescript is invalid.[22] The real force of the decretal is found in the public denunciation of the invalid act. Simply because the Pontiff says that "many things are patiently tolerated," it is hardly logical to say that the tolerated act is therefore valid. The tolerating of an act does not necessarily presuppose that it is valid. It is likewise true that the toleration of an act does not indicate that the act is invalid, either. All that can be said is that, if an act is merely tolerated, the act itself was unlawful. In his decretal Pope Innocent III mentions that the act he condemned was not only contrary to his own law but also contrary to the law of the Lateran Council. He speaks also of the culprit's intrusion into office. These are public matters, and the Pontiff orders that, if the facts are found to be true, further toleration not be shown.

Reiffenstuel also claims as support for his doctrine various examples of contracts, transactions, renunciations, etc., which are entered into through grave and unjust fear. These examples are of excellent use in demonstrating the possibility of rescinding valid but unlawful acts. But they do not necessarily show that an act contrary to an invalidating law is valid until a judge pronounces sentence. The examples which Reiffenstuel adduces would certainly today be considered as valid rescindable acts and would not be classified as acts contrary to an invalidating law.[23]

Reiffenstuel further says that if an act is not completely (*plenissime*) invalidated by law and no one opposes such an act, possession resulting from this act can be retained in conscience.[24] Such an act would be valid in natural law. Its only defect would

be its contrariety to positive law. This is, of course, assuming that positive law did not completely invalidate the act. The example Reiffenstuel uses is alienation. He claims that if alienation is otherwise licit but was made without observing the form prescribed by law, such alienation is not invalid in the internal forum. Consequently, any fruit or value of alienation can be retained until someone opposes this retention or the case is brought to court. Reiffenstuel cites Panormitanus and Johannes Andreas as also maintaining this opinion.

This example adduced by Reiffenstuel is of little importance today. Canon 1530, § 1, 3°, specifically states that alienation without proper permission is invalid.[25] No provision is made in this canon for judicial review of alienation before it is considered an invalid act.

Reiffenstuel also cites a law of the Fourth Lateran Council[26] to show that if an act is not completely invalidated by the law it can be considered valid until a judge pronounces sentence. This law, however, can scarcely be offered as support for Reiffenstuel's opinion; for, after determining the formalities required in an election, the law specifically states that any other form of election, with the exception of "quasi-inspiration," is invalid.[27]

Reiffenstuel offers two more arguments to support his opinion. One of these arguments is from reason; the other is from custom.[28]

In his argument from reason, Reiffenstuel states in effect that the natural obligation inherent in a law is inseparable from the law itself. Therefore, if the law itself does not completely invalidate an act, this act must be considered valid until a judge decides otherwise. This argument can be readily admitted if an invalidating law is not by its text immediately operative. There is nothing sensational in this argument. Given the premises upon which the argument rests, the conclusion is evident. But, the difficulty would be to determine that the invalidating law is not immediately operative. Since the whole binding power of the law depends on the will of the legislator, he can suspend the

effect of the law until a court intervenes. This, however, must be demonstrated and not presumed in invalidating laws, because the first and fundamental effect of such a law is to invalidate an act. The manner of invalidation may not be fundamental, but it must never be presumed that a non-penal law is inoperative until a judge pronounces sentence. It is possible, of course, and it is readily admitted that an invalidating law may require the intervention of the court, but this necessity must be demonstrated.

In his argument from custom, Reiffenstuel correctly estimates the force of custom. He says that custom has modified the application of an invalidating law which does not immediately and of itself operate. That this modification has been introduced cannot be denied. However, custom is superfluous in this modification. If the law, as Reiffenstuel says, is not immediately operative, it is not necessary that custom intervene in order that the act be valid until it is adjudicated. On the other hand, if Reiffenstuel means that custom alone has introduced an interpretation of an invalidating law so that its effect is not produced in the internal forum before a judge has pronounced sentence, he would be assigning to custom a destructive force which should be rejected. Such a custom would be an abuse scarcely to be tolerated by the legislator. One must remember, however, that Reiffenstuel is not speaking of custom which would interpret a law that immediately invalidates an act; he is speaking of a law which requires a judge's decision in the external forum before the act is invalid. He is reviewing the effects of this act in the internal forum before the act is adjudicated. Here, in his opinion, custom has modified whatever original intention the legislator may have had.

The examples which Reiffenstuel uses to support his opinion are not all appropriate. He says that no one should be forced to surrender what he has received if the only defect in the transaction is a non-observance of the solemnities of acts. This is especially true, he states, since the matter at hand is still disputed among canonists. Is this example illustrative of custom? Apparently not, for if the matter under discussion is correctly

presented, the application of the law is doubtful, and naturally — not by reason of custom, but by the rule of equity — the validity of the transaction must be maintained. When any serious dispute exists among canonists, the law in question is, of course, of doubtful application. No one, then, could assert the invalidity of such an act before it is adjudicated.

The second example used by Reiffenstuel is really a comparison between an invalidating law and a penal law. Reiffenstuel says that a penalty *latae sententiae* requires a declaratory sentence (*externa executio*) before it obliges in conscience. From this he deduces that the effect of an invalidating law should therefore be suspended until the ministry of the judge is obtained. Whatever may be said of this declaration as far as the penal law of Reiffenstuel's time is concerned, the present law[29] says that a penalty *latae sententiae* binds in both fora. The law does say that usually no one can demand observance of this penalty in the external forum before a declaratory sentence, but the first effect of the law is to bind in both fora. Therefore, even before a declaratory sentence is passed, the penalty should really be observed.

The discussion of Reiffenstuel's opinion has been rather long and involved, but this has been necessary in order to appraise his opinion thoroughly. Reiffenstuel enjoys unparalleled respect and is frequently cited as an approved author both in later canonical commentaries and in the opinions of the Church's courts. It is always with regret that an opinion of his is discarded. If such rejection is made here, it is because of the confusion which would arise in using Reiffenstuel's opinion to describe the operation of an invalidating law.

Criticism of Reiffenstuel's opinion on the obligation to observe the effect of an invalidating law in the internal forum does not extend to his explanation of the effect of such a law which operates completely and of itself. Reiffenstuel states explicitly that if a law completely and of itself invalidating is involved there is no doubt that an act contrary to this law is invalid in

both the internal and the external forum.[30] In this, Reiffenstuel concurs in the common opinion of canonists.

The argument of the preceding pages has necessarily been prolix. The discussion of various opinions has been long and perhaps tedious. Hence a few words of summary will not be amiss.

First, an invalidating law which does not require the intervention of a court either for declaration or for condemnation of the act in question produces its effect immediately in both fora; secondly, an invalidating law which requires such intervention of the court does not produce its effect in either forum until a sentence is pronounced. In consequence of this second statement, an act contrary to an invalidating law is considered valid until it is adjudged invalid. The effect of this judgment should be retroactive.

After the discussion of the fora in which an invalidating law can produce its effect, the question arises as to whether there is an obligation to avoid the infraction of such a law. It is impossible to say that such an obligation always exists. Since an invalidating law can be enacted for various reasons, it might seem that the legislator always insists that his law be obeyed. Insofar as this insistence is stressed, there is always an obligation to obey an invalidating law. But if, on the other hand, the matter be viewed with an eye to an obligation in conscience to omit an act controlled by an invalidating law, it cannot be established that such an obligation always exists.

There is no contradiction whatsoever between these two suppositions. For instance, if the legislator forbids an act and invalidates it if it is really performed, an obligation exists in conscience to omit the prohibited act. If, however, a certain and definite formality is established by law, there is no obligation in conscience to omit an act contrary to this law. It is, of course, to be expected that this act will be invalid since it is not in conformity with the prescriptions of law. It will, then, be necessary to make a classification of invalidating laws and consider sep-

arately their obligation in conscience. But before this is attempted, it is also necessary to emphasize that it is not the *obligation to accept the effect* of an invalidating law which is the subject of this discussion. Such an obligation is inherent in the law itself. An obligation of this kind always exists. The obligation to be considered now is the *obligation to omit* an act which would produce an invalidating effect.

As far as the obligation to omit an act is concerned, a prohibitory invalidating law is no different from a prohibitory law which does not contain an invalidating clause. The source of this prohibition is immaterial. It is of no real importance whether the prohibition be merely the will of the legislator or be founded on right order and decency. The various reasons which might influence the legislator to prohibit an act are useful to know for the interpretation of the law and in order to urge its observance, but they have no real effect on the prohibition decreed by law. Hence it is not necessary that the prohibited act be malicious in itself. It is, however, clear that the prohibited act acquires some malice from the very fact of its being prohibited.

A law which merely invalidates an act or disqualifies a person acting does not of itself oblige in conscience the omission of an act. Assuming, therefore, that a person is prepared to accept invalidation as an effect of the law, he is not further forbidden to perform such an act. A law, for instance, which demands a definite form[31] means that legal recognition will be given to an act thus performed. It means, too, that legal recognition will be denied if this form is neglected.

When an act is invalid on account of the neglect of formalities — as in a case, for instance, when there is a violation of the law which demands a definite form for wills — canon law wisely provides for the fulfilling of a testator's will. According to the norms of canon 1513, § 2,[32] the solemnities of the civil law must be observed, if possible, whenever the good of the Church is concerned; but the law also states that if these solemnities were omitted the heirs should be advised to fulfill the testator's will.[33]

The latter obligation, to fulfill the bequests made by the testator, is primarily laid upon the heirs. As such, this obligation is not properly within the scope of this work.[34] The obligation, however, to obey the prescriptions of civil law is a serious one laid upon the testator himself in canon law. There is no doubt that this is more than a suggestion, since the Church urges that the bequests of an invalid will nevertheless be executed.[35]

Van Hove[36] warns that if an act is performed contrary to an invalidating law it is completely invalid both in regard to the persons directly interested in the transaction and in regard to others who may possess some interest. It follows, then, that there is some obligation to omit an invalid act whenever the rights of others are jeopardized by such an act.

An invalidating law may also be a penal law. Hence, the theory and application of penalties must also be considered whenever an invalidating law is penal. But before any remark is made on the obligation to omit an act contrary to such a law, it must always be remembered that the penal element of the law must be correctly estimated. If the law is primarily penal and secondarily invalidating, the main points of interpretation will follow the doctrine of penal laws. If, on the other hand, the law is primarily invalidating and secondarily penal, the main points of interpretation will follow the doctrine of invalidating laws. This is obviously fundamental.

If, then, it be assumed that the invalidating law is primarily penal, the usual excuses from penalties should be applied. This is true even though ignorance does not affect the force of an invalidating law.[37] In the law under discussion, the principal item is the penalty. This penalty presupposes guilt. If, then, the penalty is not incurred, the whole law is inapplicable.[38]

If, however, the invalidating law is not primarily penal, the usual excuses from penal laws will not be of any avail. An invalidating law of this kind includes a penalty as an accessory. This accessory would naturally follow upon the application of the law itself. Invalidating laws which are introduced primarily

for the protection of society may possess penal clauses, but their first purpose is not to punish a culprit but to protect the community.

The immediately preceding paragraphs have very briefly considered the effect of penal invalidating laws. While this review of the effect of such a law is not necessary for the general purpose of this chapter, it does nevertheless lead to a statement on the obligation to avoid the infraction of such a law.

It was said earlier that prohibitory invalidating laws always carry an obligation to omit a contrary act. The same statement should be made of penal invalidating laws.

At first sight, it might seem extreme to include in this statement laws which merely contain a penal clause but which are not primarily penal invalidating laws. But on reflection it becomes evident that even with only an accessory penal invalidating clause the legislator is prohibiting a contrary act.

The difference between an invalidating law which is primarily penal and an invalidating law which is only secondarily penal is, as far as a prohibition is concerned, a difference of degree, not of species. It is clear that a penal invalidating law prohibits a contrary act. The very penalty itself is a punishment for the performance of the act. It is inconceivable that the legislator should punish an act if it were not prohibited. While it is true that not every unprohibited act is necessarily valid or recognized by law (and thus invalidity does not necessarily entail punishment), in a penal invalidating law the legislator clearly and openly threatens to punish violations of his law. This threat is a prohibition of a contrary act. In a lesser degree the same argument can be made for an invalidating law which, while not primarily penal, does contain a penal clause. It must always be kept in mind that invalidity and penalties are separable. By invalidity the legislator refuses to grant recognition to an act; by penalties he punishes violations of his law. When both invalidity and penalties are united in the same law, the threat of punishment must

necessarily fall on the act contemplated by the law itself. Therefore, the act involved is prohibited.[39]

To repeat: prohibitory invalidating laws always oblige the omission of a contrary act; penal invalidating laws also thus oblige; invalidating laws which neither prohibit nor threaten punishment do not always thus oblige. An obligation, however, can be asserted whenever the rights of others are jeopardized.

A third and final point to be considered in this chapter on the obligation of invalidating laws is the possibility of impeding this obligation. Can the effect of an invalidating law be impeded so that its obligation is suspended? The answer to this question again demands a division between invalidating laws which immediately operate and invalidating laws which must wait for a judicial sentence before they operate.

In regard to invalidating laws which immediately operate no impediment can postpone their operation. By impediment is here meant anything which the subject of the law could place to hinder or postpone the law's operation. In this sense a legitimate excuse from the law is not an impediment. Invalidating laws which immediately operate do so because of the will of the legislator. In these laws he has eliminated any necessity for a judicial declaration of nullity or of a judicial condemnation.

Laws, however, which require a declaration of nullity or its pronouncement as a condemnatory sentence can be impeded. Whenever this impediment is placed, the obligation of the law is suspended.

All kinds of impediments can thus hinder the operation of such invalidating laws. The first general group of impediments would be those which would of themselves prevent a court from reviewing an act contrary to an invalidating law. Acts, for instance, which are secret, or are of no specific public interest but which are controlled by invalidating laws may perhaps never come to the court's attention. No one who commits an act contrary to an invalidating law is obliged to present this act for adjudication. This would obviously be admitted where a penalty is in-

volved. But it would be equally applicable where the law does not establish a penalty. Suárez held that it would even be permitted to conceal the act contrary to law[40] because, as he says, the law itself is not thereby violated. However, he does advise against this practice, for the act should be rescinded.

The impeding in this way of the application of an invalidating law is closely associated with the question of the validity of an act before its judicial adjudication. Hence, the usual problems of whether such a law is really rescissory will once again be confronted. It should be unnecessary to analyze these problems again, for the same arguments presented before and the same conclusions arrived at before would again be stated. The reason why a discussion of the impeding of an invalidating law must be offered is because such laws are commonly considered not as rescissory laws but as true invalidating laws. Hence, some consideration must be given to this common concept.[41]

If the law does not immediately invalidate an act or disqualify a person from acting, it can be impeded by a refusal to implore the aid of a court. In a contract, for instance, both parties may be willing to accept the condition of the contract and refuse the aid of the court. Or again, the party suffering a disability may be unwilling to seek redress. In whatever way this refusal to seek redress may be manifested, it impedes the effect of the invalidating law.

The invalidating law can likewise be impeded by the refusal of the judge to declare or pronounce sentence.[42] Since the law is inoperative until the court applies it, this refusal is sufficient to impede the law. It is of little consequence whether the judge decides that the act is not contemplated by the law and therefore refuses to act, or deliberately and maliciously refrains from exercising his ministry.

The inactivity of the court can likewise be procured by malice other than its own. The source of this inactivity is immaterial as long as the law requires that a court intervene to declare an act invalid or to pronounce it invalid by sentence.

Prescription can also impede the effect of an invalidating law. Such prescription can be secured both against a person who has a right to petition for the declaration of nullity, and against a sentence which actually declared an act null and void but which sentence was itself invalid.[43] Pleas of nullity, however, can best be discussed in a separate chapter.[44]

## Chapter VI

# REASONS ALLEGED TO EXCUSE FROM INVALIDATING LAWS

THIS chapter will review various reasons which might be offered to escape from the obligation to obey invalidating laws. There will, then, be no intention of discussing the possibility of a dispensation from an invalidating law. No one doubts that the legislator can dispense from invalidating laws since such invalidating effect is due mostly to his will. Whenever such an effect is not due to his will but rather to the force of divine law, natural or positive, the legislator is, of course, powerless to dispense.

This chapter, likewise, will have little to say about excuses which might be used to keep a court from declaring an act invalid. Such discussion can be understood as being virtually contained in the paragraphs which dealt with the impeding of a court's decision.

There remains, then, the consideration of invalidating laws which immediately invalidate an act or disqualify a person from acting legally. Can any reason be alleged which would not merely hinder or impede the operation of an invalidating law but rather excuse altogether from its obligation? There are alleged reasons which demand serious consideration in order to determine whether they can be accepted.

Besides these alleged reasons there should be a disquisition on entirely doubtful invalidating laws and on a law whose existence is certain but whose invalidating clause is doubtful.

These items, the reasons alleged and the doubtful laws and clauses, will be examined in turn.

The principal reasons alleged for the release from the obligation of an invalidating law are ignorance, fear and surrender of

rights.[1] Of these reasons perhaps ignorance demands the greatest attention.

Ignorance is taken here to mean ignorance which is inculpable and which cannot be overcome. There are other forms of ignorance, but invincible and inculpable ignorance would offer the best example for consideration as a possible excuse from the obligation of an invalidating law. If invincible and non-culpable ignorance will not excuse from such obligation, no lesser form of ignorance could be successfully presented. Does invincible and inculpable ignorance, then, excuse from the obligation of an invalidating law?

Modern authors, at least where the matter of non-penal invalidating laws is concerned, are united in denying that ignorance is an excuse from the obligation to observe an invalidating law.[2] This doctrine is presented in the authors' commentaries on canon 16, § 1, of the Code of Canon Law. There canon law speaks in a universal way, denying to ignorance force as an excuse from the obligation to observe invalidating law.[3] The law itself is very definite; and, consequently, any act which, in ignorance, is placed contrary to an invalidating law will be invalid unless a specific exception is made in the Code of Canon Law. Michiels at first does not exclude any law from the force of canon 16, §1.[4] He includes even penal laws, but he does not distinguish between invalidating laws which are primarily invalidating and such laws which are primarily penal. Van Hove makes this distinction.[5] He excludes from the power of canon 16, §1, invalidating laws which are primarily penal and only secondarily invalidating.

Michiels has the text of canon 16, § 1, in his favor. No specific exception is made there for invalidating laws which are primarily penal. Van Hove, however, rests his argument on the general principles of penal law which demand that a crime be committed before a penalty is incurred. Both Michiels and Van Hove argue logically, and their arguments are not necessarily productive of directly contrary conclusions. Van Hove himself admits this in maintaining that Michiels is not really

opposed to his own opinion.[6] Their disagreement is largely a matter of expressing an exception to the force of canon 16, §1. Van Hove clearly states that an invalidating law which is primarily penal is non-obligatory when the law is unknown. Michiels states that the law is inoperative if the fact upon which it rests is not known to be a crime.[7] These are two ways of expressing the same thing. If the invalidating law rests primarily on a fact of crime, the crime must have been committed before the invalidating law becomes effective. Therefore, the excuse of ignorance can at times impede the force of an invalidating law.[8] It must not be thought, however, that most invalidating laws which contain penalties are primarily penal. Such laws exist,[9] but the presumption is in favor of the invalidating force of a law rather than its penal force, since invalidation is normally the first and fundamental effect of an invalidating law. Primary penal effect in such laws must be demonstrated.

Knowledge of the invalidating law itself but ignorance of a penalty is no excuse from the obligation of an invalidating law.[10] The assumption here is that the penalty is accessory, and, therefore, there is no ignorance in regard to the fundamental idea of an invalidating law. The foundation for such a law is public order or public decency. The penalty is threatened in order to further effect obedience to the law.

Aside from invalidating laws which contain penalties, there is no dispute about other invalidating laws. Ignorance does not excuse from their obligation unless a specific mention of this is made in the Code of Canon Law. Such an exception could be found in canon 209.[11] Another exception could be found in canon 2247, § 3.[12] It is disputed whether another exception is present in canon 1099, § 2.[13] Toso claims that this part of the canon consists in an exception to canon 16, § 1.[14] This is denied by Van Hove.[15] The reason advanced by Van Hove is persuasive. It is not because non-Catholics are ignorant of the law of the Church that they are exempt from the Catholic form of marriage; but because of the common good such marriages should be

valid, since the Church knows they will not be entered into according to her established form.

Fear is likewise offered as a reason to excuse from the obligation of an invalidating law. Canon 103, § 2, however, states that acts performed through grave and unjust fear are not invalid.[16] At first sight it would seem that canon 103, § 2, is not applicable when one is induced to act contrary to an invalidating law. While it is true that the first purpose of this part of the canon is to provide for the validity of acts, the principle underlying this canon is indeed applicable to invalidating laws. The principle contained in canon 103, § 2, is that fear does not release one from the obligation of the law. Fear does not destroy the law's effect. Applying this principle to invalidating laws, one cannot claim that fear releases from the effect of such a law. In other words, if one disobeys an invalidating law through fear, the act remains valid. This is an application of the principle in canon 103, § 2.

An interesting application of the principle incorporated in canon 103, § 2, is to be found in Suárez.[17] He says that it is at times necessary for an act to be valid in order to preserve one's life, as, for instance, when a person is, through this fear, forced to marry a close relative in order that the marriage may be consummated without sin. Even in such circumstances, Suárez says, the invalidating law binds because its effect depends on the legislator and not on the will of the subject of the law. In the example adduced the marriage would be invalid and consummation sinful. The marriage is invalid because of the positive law; the sin is committed because natural law forbids incest. Suárez likewise produces other examples which can be studied with profit.[18]

The third principal reason alleged as excusing from the obligation of invalidating laws is the surrender of rights. This reason cannot be dismissed immediately as inappropriate. Nor is there such clear-cut legislation today to dispose of this reason. It must, however, be rejected insofar as it affects most invalidating laws, but it may possibly be a valid reason at times.

The surrender of one's rights is entirely proper whenever the rights of others and the rights of society itself are not involved. If, then, an invalidating law were enacted primarily for private benefit, so that the rights of society were not even remotely affected, there is no reason why this private right could not be surrendered.

Invalidating laws, however, are enacted primarily for the public good. The benefit of these laws does descend to private persons, but this is not their first purpose. A law, for instance, which controls the form of testaments is enacted for the public good in order to safeguard citizens from fraud. The actual benefit of the law does descend to these citizens. They are protected from fraud. In such a matter no surrender of this right can be accepted either because fraud is not present or because it is not feared. The whole presumption of the law is that danger of fraud exists. This presumption is established by the legislator, and it is not to be removed without his consent. Hence in no case can private judgment and private desire excuse from an invalidating law which is enacted for the public good. This principle as applied to canon law is found in canon 21 of the Code of Canon Law.[19]

Suárez expresses this principle admirably.[20] He says that no one may renounce or derogate from the common good by his own surrender. He calls such surrender of rights frivolous and null.

Suárez comments on the above alleged reasons to excuse from the obligation of invalidating laws. He adds two more alleged reasons, epicheia and the cessation of the purpose of the law. Epicheia was considered earlier as a possible means of interpreting the obligation of an invalidating law. It is sufficient to mention here that Suárez does not admit epicheia as a valid reason to excuse from the effect of an invalidating law.[21] He does, however, consider the cessation of the purpose of the law as a reason why the use of epicheia might be possible. Since, however, he denies the use of epicheia in regard to interpreting the obligation

of invalidating laws, he must also admit that the cessation of the purpose of the law cannot be determined by private interpretation. Thus Suárez would deny any validity to a benevolent interpretation of an invalidating law through a claim that its purpose is impossible of attainment or has even been destroyed.

Besides these alleged reasons to excuse from the obligation of invalidating laws, the question of a doubt of law must be studied insofar as it affects the obligation to obey such laws. Doubt of fact (that is, doubt concerning the existence of a particular fact) is not of great importance for the study of the obligation of invalidating laws, for when such a doubt is present the law itself is not subject to direct doubt and, therefore, the obligation itself is secure. In case of a doubt of fact, the obligation to obey the law is not questioned. The point at issue is whether the fact exists which would be contemplated by the law. Hence a dispensation, if possible, is the remedy for releasing from the obligation of the law should the doubtful fact be considered as possibly or probably contemplated by the law. The effect of this dispensation (the power to confer which is conceded to Ordinaries in canon 15)[22] is to provide for the validity of an act which might be contrary to the prescription of an invalidating law.[23]

The question, however, of a doubt of law (that is a doubt regarding the precept of law itself) immediately concerns the obligation of an invalidating law. It is necessary, therefore, to keep in mind the various ways in which a law can be doubtful. These ways include the meaning of the text of the law, its conditions, its clauses, its extension to certain acts,[24] etc. A doubt of law can also be found in a question concerning the existence or permanence of the law. Here, too, one must also consider the various ways in which a law may possibly have ceased to exist. This abrogation will also include a consideration of custom, concordat, privilege and dispensation.[25] It must also be remembered that the doubt of law with which we are here concerned is a positive and objective one.[26] Negative and subjective doubts are

not being considered. Moreover, the question of a doubt of law as treated here has no reference to divine law or to the matter and form of the sacraments.[27]

While all the above details must be kept in mind in discussing a doubt of law in relation to invalidating laws, there will be no purpose in trying to fit canon 15 into one or the other moral systems. Whatever validity these systems had before the promulgation of the Code of Canon Law, is retained provided it is not contrary to the sense of canon 15. Van Hove has a word of criticism of those who attempt to read distinctions where they are not found in canon 15.[28]

Now what does canon 15 say in regard to a doubt of law?[29] The principal point mentioned in regard to a doubt of law is that laws about which there is such doubt do not bind. And the canon specifically includes invalidating laws in this statement. It would not have been necessary to include these laws specifically, but the legislator evidently intended to leave no doubt of their inclusion. Hence any question that might arise in regard to the importance of the law, or in regard to possible harmful effects to society or its members is excluded. Similar questions of decency and propriety are also excluded. The legislator has determined that nothing can stand against the principle that a doubtful law does not bind. This determination is evident from the specific inclusion of invalidating laws in canon 15. Hence, according to this canon, whatever can be said about the foundation and applicability of canon 15 to non-invalidating laws can also without reservation be predicated of invalidating laws.

An extensive discussion of the foundation and applicability of canon 15 is actually beyond the scope of this work. But it will be useful to point out some items which support the doctrine embodied in canon 15.

Cicognani cites Rule 57 of the Rules of Law of Pope Boniface VIII,[30] saying that canon 15 is an explicit interpretation of this rule.[31] Michiels seeks the foundation for canon 15 in the principle

that it is not lawful to restrain the natural liberty of man unless the obligation to obey a law is certain.[32]

Both the reasons assigned by Cicognani and Michiels are true foundations for the law in canon 15. The reason adduced by Michiels considers the assimilation of man into a group where he retains all his natural freedom unless some part of it is clearly curtailed. Cicognani assumes this principle and approaches the curtailment of natural freedom from the standpoint of how this curtailment is effected. In a society this natural freedom is curtailed by means of law. It follows, then, that such curtailment must be clear; otherwise it cannot produce its effect. The principle, then, of natural freedom and Rule 57 of the Rules of Law of Pope Boniface VIII coalesce into an immediate rule of law that a doubtful law does not bind. This rule is practically the text of canon 15.[33]

The above paragraphs have considered the foundation of the law given in canon 15. The applicability of this law depends on a demonstration of doubt of law. It is generally assumed that a law is clear and definite. This assumption is a presumption of law. But since it is possible that the law may not be clear and definite, a doubt of law can arise. This doubt, however, must be demonstrated[34] and cannot be lightly assumed. Serious study and serious investigation are presupposed before a law can be said to be doubtful. This is true of the application of canon 15 to all laws, but it is particularly true of its application to invalidating laws, where matters of great importance and matters of public welfare are concerned. Yet, as mentioned earlier, if a doubt of law is established, no reason founded on the importance of the law or on public welfare will hinder the application of canon 15 to invalidating laws.

Considering, then, the rule of canon 15 in relation to invalidating laws, any doubt of law affecting the law as a whole, or affecting the invalidating clause alone will release from the obligation of the law. No invalidating law is excluded. A pro-

hibitory invalidating law, a penal invalidating law, an invalidating law which demands formalities or solemnities, are all included within the scope of canon 15. Should the invalidating law, either in itself or in its invalidating clause, be demonstrated as doubtful there is no obligation to obey it.[35]

## Chapter VII

# THE IDENTIFICATION OF INVALIDATING LAWS

THE identification of invalidating laws is of supreme practical importance. It will be of little avail to know the theory without having an excellent knowledge of how to identify such a law. Canon 11 of the Code of Canon Law has effectually disposed of many difficulties which were formerly encountered. Today no law is to be considered as possessing an invalidating effect unless this effect is expressly or equivalently determined in the law itself. This establishes a presumption which dictates that acts are valid and persons are competent to act legally unless invalidation of the act or disqualification of the person is clearly and indubitably determined.

While canon 11 of the Code of Canon Law apparently proposes such a definite norm of judgment that indecision or doubt would seem to be impossible, it is nevertheless true that much profitable discussion can still be had regarding the force of certain clauses. Not every clause is clearly invalidating. Further, some clauses clearly invalidate in certain instances, whereas in other cases their effect is not so obvious.[1] It will therefore be necessary to consider separately the legal value of the various clauses and phrases.

The first part of this chapter, then, will be devoted to an enumeration of the clauses which clearly and always invalidate an act or disqualify a person. Each clause will be followed in the text by a citation of the place where it is found in the Code of Canon Law and, frequently, by an indication of its use there. Some of these clauses have variations. These will be pointed out. In this list will be included both expressly invalidating clauses and clauses which are equivalent to expressly invalidating clauses. It seems better to use this arrangement, for the clauses enumerated

in this first list are those which will always invalidate an act or disqualify a person. Then, too, some of these equivalent clauses establish formalities or solemnities which must be fulfilled before the act can be considered valid.

The second part of this chapter will enumerate the doubtful clauses, or clauses which may at times invalidate an act. This list will indicate in what circumstances the clauses definitely invalidate and in what circumstances the same clauses do not produce such an effect. As a short preface to this part of the chapter, a few lines will be devoted to an attempt to remove the doubt from some alleged doubtfully invalidating clauses.

It is understood, of course, that examples in these two parts of the chapter will concern juridical acts. The lists of examples will not mention canons of the Code of Canon Law which do not consider the validity of acts;[2] or canons treating an act which did not actually occur;[3] or canons in which the law establishes an exception.[4] The chapter will close with a list of invalidating clauses to be found in penal law. All through this study an attempt has been made to keep separate the penal invalidating law from the non-penal invalidating law. This attempt has not always been successful because of the essentially restrictive force of an invalidating law. However, it will be useful to see at a glance all the penal laws which invalidate an act — or, as is principally the case — which disqualify a person from acting validly. Not all the laws found in the fifth book of the Code of Canon Law will be listed in this latter division but only the laws which specify definite punishments for definite crimes.[5]

A. *Clearly invalidating clauses.*[6]

1. *Amittit:* canon 175; cf. also, canons 177, § 1; 178; 181, § 2; 1554; 2280, § 1.
2. *Caret:* contractus vi caret — canon 534, § 1; caret voce — canons 629, § 2; 639; provisio omni vi caret — canon 729; hoc pactum omni vi caret — canon 980, § 3;

caret iure assistendi — canon 2259, § 1; cf. also — canon 1441.

3. *Dirimit:* impotentia . . . ipso naturae iure dirimit — canon 1068, § 1; affinitas dirimit — canon 1077, § 1; impedimentum . . . nuptias dirimit — canon 1078.
4. (*a*) *Effectum non sortitur:* canon 116.
   (*b*) *Ut suum sortiatur effectum:* canon 650, § 2, 2°.
   (*c*) *Ut . . . effectum sortiatur:* canon 1664, § 1.
   (*d*) *Ullum* (*nullum*) *iuridicum effectum:* canons 150, § 2; 162, § 5; 647, § 2, 4°.
5. *Eximit:* canons 2203, § 2; 2229, § 2; cf. also, canons 2209, § 5; 2213, § 3; 2229, § 3; 2230; 2232, § 1.
6. *Exsulat omnino:* canon 2201, § 3.
7. (*a*) *Inhabiles* (*inhabilis*)*:* ad munus . . . inhabiles sunt — canon 504; cf. also, canons 1439, § 1; 1558; 1600; 1611; 1650; 1652; 1654, § 1; 1757, § 3; 1971, § 2; 2027, § 2; est inhabilis ad obtinenda beneficia — canon 2294, § 1.
   (*b*) *Inhabilitas:* secumfert . . . inhabilitatem, canon 2303, §1.

The above canons, together with the penal canons to be seen later, positively establish a disqualification. There are, however, several clauses which by definite determination exclude any other way of acting legally or exclude any other person from acting. Such exclusion results in the disqualification of all who are not named in the specific canons. These clauses must be mentioned here under the general division of *inhabilitas.*

(*c*) *Una* (*unus, uni, ab una, ab uno*) *Sedes Apostolica* (*Sedis Apostolicae, Sedi Apostolicae, Sede Apostolica, Romani Pontificis, Romano Pontifici, Romano Pontifice*)*:* canons 215, § 1; 247, § 5; 293, § 1; 332, § 1; 350, § 1; 494, § 1; 627, § 2; 1414, § 1;

1422; 1433; 1551, § 1; 1557, § 1; 1999, § 1; 2296, § 1; cf. also, canons 1244, § 1; 1323, § 3.

(*d*) *Unus cancellarius* (*uni promotori iustitiae*): canons 377, § 2; 1934.

(*e*) *Unicus* (*unice*): canons 25; 160; 362; 1141; 1350, § 2; 1517, § 2; 2330.

(*f*) *Omnis et solus:* canons 745, § 1; 938, § 1.

(*g*) *Solus* (*solos, solis, soli, sola*): canons 118; 201, § 1; 638; 782, § 1, § 4; 802; 845; 871; 968, § 1; 1145; 1337; 1973; 1994, § 2; 2295; cf. also, canon 1460, § 1.

8. (*a*) *Incapaces:* ut incapaces — canon 1757, § 3; cf. also, canon 1795, § 2; incapaces — canon 2201, § 1; incapaces praesumuntur — canon 2201, § 2.

(*b*) *Ut quis capax sit:* canon 925, § 1.

9. *Incompetentia . . . absoluta:* canon 1558; cf. also, canons 1600; 1611; 1692.

10. (*a*) *Invalidus:* gratia . . . invalida est — canon 44, § 2; dispensatio . . . invalida est — canon 84, § 1; electio ipso iure invalida est — canon 166; secus electio est invalida — canon 172, § 2; secus obtenta venia invalida est — canon 534, § 2; etiam invalidos — canon 579; absolutio . . . invalida est — canon 884; error . . . invalidum reddit matrimonium — canon 1083, § 1; invalidum quoque est matrimonium — canon 1087, § 1; illud reddit invalidum — canon 1092, 2°; consecrationes . . . invalidae sunt — canon 1148, § 2; sine qua alienatio invalida est — canon 1530, § 1, 3°; cf. also, canon 1533; actus . . . etiam invalidus — canon 2264; actus est invalidus — canon 2284.

(*b*) *Invalide:* invalide . . . conceditur — canon 43; invalide . . . fungitur — canon 53; invalide agit —

canon 105, 1°; invalide . . . admittuntur —canon 542, 1°; cf. also, canon 679, § 1; invalide . . . attentat — canon 1069, § 1; invalide . . . attentant — canon 1072; invalide contrahit — canon 1086, § 2; invalide conferuntur — canon 1434.

11. (*a*) *Irritus:* utrumque irritum est — canon 48, § 3; irrita est exsecutio — canon 55; error actum irritum reddit — canon 104; provisio . . . ipso facto irrita — canon 150, § 1; renuntiatio . . . irrita est ipso iure — canon 185; secus electio irrita est — canon 433, § 1; renuntiatio . . . ipso iure irrita est — canon 568; ordinatio . . . irrita est — canon 957, § 2; ordinatio est irrita — canon 964, 1°; promissio irrita est — canon 1017, § 1; matrimonium irritum est — canon 1076, § 1, § 2; secus mandatum irritum est — canon 1089, § 2; secus irrita est — canon 1096, § 1; unio . . . irrita est — canon 1428, § 2; praesentatio est ipso iure irrita — canon 1465, § 2; dimissio . . . irrita est — canon 1485; secus licentia irrita est — canon 1532, § 4; acta irrita sunt — canon 1587, § 1; cf. also, canon 2010, § 1; poenae remissio . . . ipso iure irrita est — canon 2238.

(*b*) *Irritat:* cognatio matrimonium irritat — canon 1079; error . . . matrimonium irritat — canon 1083, § 2.

(*c*) *Irritatio:* nisi irritatio . . . statuta fuerit — canon 1058, § 2.

(*d*) *Irritari potest* (*debet*)*:* sed . . . irritari potest — canon 153, § 3; debet . . . irritari — canon 162, § 2; potest . . . irrita reddere — canon 1312, § 1; cf. also, canon 1320.

12. (*a*) *Nemo potest* (*capiat*)*:* nemo . . . potest accedere — canon 172, § 4; nemo potest abrogare — canon

1040; nemo conferre potest — canon 1377; nemo potest . . . conferre — canon 1437; nemo possessionem . . . capiat — canon 1443, § 1; nemo potest praesentare — canon 1461.

(*b*) *Nemine* (*nemini*): a nemine iudicatur — canon 1556; nemini conferantur — canon 156, § 1; cf. also, canon 1439, § 1.

13. *Nihil:* nihil est actum — canon 171, § 3; nihil agit — canon 203, § 1; nihili faciendum est — canon 2029.

14. *Non adiectae* (*non-appositae*): conditiones . . . non adiectae censentur — canon 169, § 2; conditiones . . . pro non appositis habeantur — canon 172, § 3; pro non adiecta habeatur — canon 1092, 1°; tanquam non adiecta habeatur — canon 1203, § 2; tanquam non appositae habeantur — canon 1515, § 3.

15. *Non admittitur:* canons 1690; 1695, § 2; 1698. § 2.

16. *Non habent personam standi:* canon 1652; cf. also, canons 1650; 1654, § 1; 1892, 2°.

17. *Non facit fructus suos:* canons 729, 2°; 1475, § 2; cf. also, canons 418, § 3; 2266; 2280, § 1.

18. *Non satisfacit:* canon 1407.

19. *Non sustinentur:* canon 46.

20. *Non* (*nec*) *valent* (*valet*): canons 83; 156, § 3; 558; cf. also, canons 167, § 2; 654; 991, § 1; 1509; 1880; 2249, § 2.

21. (*a*) *Nullus:* provisio est nulla — canon 153, § 3; electio est ipso iure nulla — canon 162, § 3; electio est ipso facto nulla — canon 165; suffragium est nullum — canon 169, § 1; actus . . . positi nulli sint — canon 176, § 3; postulatio . . . nulla evadit — canon 181, § 2; nulla . . . potestas . . . nisi — canon 199, § 5; actus . . . ipso iure sunt nulli — canon 434, § 3; nullam . . . partem . . . retinere potest — canon 437;

nulla . . . recognoscitur — canon 686, § 1; nulla religio — canon 703, § 1; nulla . . . sodalitas — canon 705; nulla associatio — canon 721, § 1; nullum est matrimonium — canon 1070, § 1; nullum . . . matrimonium — canon 1074, § 1; quod . . . ad . . . nullitatem attinet — canon 1074, § 3; electio sit nulla — canon 1227; votum . . . ipso iure nullum est — canon 1307, § 3; nullam . . . actus consequitur firmitatem — canon 1318, § 2; nulla vi praefinitio . . . pollet — canon 1507, § 1; nulla valet praescriptio — canon 1512; patronus . . . nullum ius habet — canon 1546, § 2; adeo ut nulla habeatur acta — canon 1585, § 1; cf. also, canon 2142; nulla est pactio — canon 1665, § 2; attentata sunt ipso iure nulla — canon 1855, § 1.

(*b*) *Nullius momenti:* canons 1723; 1861, § 2; cf. also, canons 1711, § 1; 1712; 1715; 1894, § 1.

(*c*) *Nullatenus:* canons 1674; 2202, § 1.

22. *Nunquam ferri potest:* canon 2191, § 2.
23. *Omnino aufert:* canon 2205, § 4.
24. *Opus est* (*erit*)*:* canons 586, § 1; 622, § 1; 879, § 1.
25. *Perimit:* canon 1850, § 1.
26. (*a*) *Prorsus excludit:* canon 2205, § 1.
    (*b*) *Excluduntur:* canons 1520, § 1; 1600; cf. also, canons 316, § 1; 371.
    (*c*) *Exclusive:* canons 249, § 3; 251, § 1; 1962.
27. *Pro infectis habentur:* canon 103, § 1.
28. *Requiritur et sufficit:* canon 534, § 1; 1884, § 1.
29. *Sub poena,* etc.: sub poena nominationis irritae — canon 406, § 2; sub poena nullitatis gratiae — canon 920; sub poena nullitatis . . . dispensationis, canon 991, § 2.
30. (*a*) *Subscriptio:* claudatur cum . . . subscriptione — canon 1874, § 5; cf. canon 1894, 3°.
    (*b*) *Subscribant:* canon 1811, § 2.
31. *Tollunt* (*tollit*)*:* canons 2205, § 2; 2206.

32. *Ut . . . admittatur:* canons 1651, § 1; 1658, § 2; cf. also, canon 1791, § 1.
33. *Ut quis sit patrinus:* canons 765, 795.
34. (*a*) *Valide:* ut . . . valide incardinetur — canon 112; nequit . . . valide obtineri — canon 147, § 1; conferri valide nequeunt — canon 154; nequit . . . valide conferri — canon 157; nemo valide dare potest — canon 170; deputari valide nequit — canon 434, § 1; ut quis . . . valide assumatur — canon 453, § 1; antea nequit valide — canon 581, § 1; ut quis . . . valide . . . receptus sit — canon 692; valide recipi nequeunt — canon 693, § 1; nequeunt . . . valide erigere — canon 703, § 2; nulla associatio potest . . . valide aggregare — canon 721, § 1; baptismus . . . valide non confertur — canon 737, § 1; valide uti nequeunt — canon 782, § 3; valide confirmari nequit — canon 786; valide . . . indigent — canon 876, § 1; valide . . . opus est — canon 879, § 1; valide contrahere nequeunt — canon 1075; nequeunt . . . valide contrahere — canon 1080; ut . . . valide ineatur — canon 1089, § 1; antequam . . . valide contrahat — canon 1121, § 1; nemo . . . valide . . . potest — canon 1147, § 1; nequeunt valide alienari — canon 1281, § 1; praestari valide nequit — canon 1316, § 2; supprimi . . . valide nequeunt — canon 1417, § 2; valide conferri nequit — canon 1436; nullum . . . ius . . . constitui . . . valide potest — canon 1450, § 1; transmitti valide nequit — canon 1453, § 1; ut valide possit — canon 1453, § 2; nequit valide . . . revocari — canon 1459, § 2; fieri valide nequit — canon 1487, § 1; fieri valide nequit — canon 1927, § 1; cf. also, canon 1930; prohibentur ab arbitri munere valide gerendo — canon 1931; fungi valide nequeunt — canon 2014; con-

ferre valide nequit — canon 2146, § 3; ut valide agat — canons 2152, § 1; 2165; ut valide procedat — canon 2159; nequit . . . valide consequi — canon 2265, § 2.

(*b*) *Ut acta valeant:* canon 2148, § 2.
(*c*) *Pro validitate:* canon 172, § 3.
(*d*) *Ad validitatem:* canons 556, § 2; 572, § 1, § 2; 686, § 3; 694, § 2; 723; 1017, § 2; 1133, § 2; 2094.
(*e*) *Ad validam . . . absolutionem:* canon 872.
(*f*) *Ut valeat:* canons 187; 555, § 1; 1225; 1740, § 2.
(*g*) *Ut valida sit* (*fiat*)*:* canons 186; 1137; 1459, § 2.
(*h*) *Ne invalide agat:* canon 2153, § 1.

35. *Vim habere:* id vim iuris habet — canon 101, § 1, 1°; ut postulatio vim habeat — canon 180, § 1; vim probandi . . . non habent — canon 1819.
36. *Vitio nullitatis . . . laborat:* canons 1892; 1894.

The above list of invalidating clauses is long, but it is not complete. This list must be supplemented by the next one. In the following list the word or clause cited is subject to an invalidating interpretation. Only if the interpretation eventually becomes clear can the clause be used to invalidate an act or disqualify a person. Whenever actual doubt remains after investigation, the clause must be interpreted as non-invalidating.

B. *Clauses which may invalidate an act or disqualify a person.*

The clauses which are considered at this time number eleven: *arcentur, debet, dummodo, indiget, necessarius* (*necesse*), *nequit* (*non potest*), *nisi* (*non nisi*), *oportet, requiritur, reservata, tantum* (*tantummodo*). After a few words of explanation each clause will be separately discussed, and the canons in which it indicates invalidity will be cited. In a footnote will be noted canons which, while containing the same word or clause, do not possess the same legal effect.

The difficulty in interpreting the clauses just named is to be found in their possible use according to different meanings.

Fundamentally all these clauses enjoin an obligation, but possibly it is not intended that this obligation should be enforced under invalidation or disqualification. But since the obligation *may* exist, it is necessary to see whether the legislator intended it also, merely by using a clause which would not of itself be clearly indicative of that intention. In all the consideration given to these clauses, there must never be any sign of adding to what was the legislator's will. The will of the legislator in regard to what constitutes an invalidating law is indicated in canon 11, and it is only by virtue of the clause *aequivalenter* in this canon that any discussion of the identification of invalidating laws can be legitimately taken up. Had the legislator limited the force of his law to include only expressly invalidating clauses, the following list would be at least superfluous. Allowance, however, is made in canon 11 for equivalent clauses, and hence the following list is necessary. Naturally all judgments are based on the desire to learn the legislator's will, so that acts which he intends to invalidate and persons whom he intends to disqualify may be known. The invalidation effected by these clauses may also include a denial of legal recognition of acquired rights.[7]

1. *Arcentur.* An invalidating force is found in this word in canon 132, § 1, which forbids clerics to marry. Other uses of *arcentur* and its variations do not possess the same force.[8]
2. *Debet* (*debent*). This clause is used more frequently than not with invalidating effect. In fact, it is at least twice used with the word *valide* or its equivalent. Its use as an invalidating clause is found in canons 353, § 2; 373, § 3; 574; 633, § 1; 650, § 2, 2° (with *ut suum sortiatur effectum*); 657; 1121, § 1 (with *valide*); 1585, § 2; 1596; 1642, § 1; 1651, §1; 1780, § 2; 1801, § 1; 1869, § 2; 1873, § 1, 3°; 2013; cf. also, canon 1585, § 1. Other occurrences of *debet* do not bind to the extent of invalidity being incurred if the injunction in question is ignored.[9]

3. *Dummodo.* This clause is also used more frequently than not with an invalidating effect. As far as rescripts are concerned, it is one of the particles showing an essential condition.[10] In most instances where *dummodo* is used, the clause it introduces can easily be reduced to an essential condition. Its uses in the Code of Canon Law with invalidating effect are to be found in canons 42, § 1, § 2; 47; 151; 507, § 3; 580, § 3; 883, § 1; 916; 929; 934, § 2; 1052; 1095, § 1, 3°; 1116; 1135, § 3; 1136, § 1; 1139, § 1; 1299, § 2; 1313, § 1; 1338, § 1; 1417, § 1; 1430, § 2; 1446; 1465, § 1; 1532, § 3; 1628, § 3; 1673, § 1; 1719; 1738; 1751; 1905, § 1; 2021; 2150, § 3; 2247, § 3. Other instances where *dummodo* is used do not indicate a law that binds under invalidity.[11] Frequently merely a directive force is indicated.
4. *Indiget* (*indigent*). This clause indicates a necessary permission or confirmation in office. It is used for validity in canons 212, § 2; 426, § 5; 621, § 1; 1338, § 2; 1573, § 5; 1590, § 1; 1658, § 2. Where permission is not necessary for the theological nature of an act, the word *indiget* is not used for validity.[12]
5. *Necessarius* (*necesse*). This clause would seem to have a clearly invalidating effect. The only reason any doubt at all may be cast upon its universal invalidating effect is the fact that sometimes it occurs with the word *valide,* followed by other words, and sometimes without it. It is obvious, though, that even without such a word *necessarius* or its equivalent is always to be considered for validity. The word is found in canons 332, § 1; 353, § 1; 497, § 3; 534, § 1; 554, § 1; 556, § 2, with *ad validitatem;* 626; 649; 658, § 1; 660; 692; 694, § 2, with *ad validitatem;* 1047; 1082, § 1; 1088, § 1, with *valide;* 1136, § 3; 1225, with *ut valeat;* 1661; 1664, § 1, with *ut effectum sortiatur;* 2020, § 1.

6. *Nequit* (*nequeunt*), *non potest* (*non possunt*). This clause occurs more frequently than any other in the Code of Canon Law. There are times when it clearly indicates invalidity and other times when such an effect is just as clearly obviated. But it is not always evident what force is intended in the law. A few words of discussion will be appropriate.

The clause under discussion signifies an inability to act. At first sight this inability would seem to imply a total lack of power. This was its usual interpretation in Roman law, where certain rights were conceded by law and other rights denied, so that any excessive use of power was invalid. This was a logical position deduced from the principle of law contained in the constitution of Justinian.[13] When, however, the vigor of Roman law was mitigated in canon law, so that acts contrary to law were not necessarily invalid, the force of the clause *nequit,* etc., naturally came to mean either that the act contrary to law was invalid or that it was merely illicit. At all times, an obligation remained to omit the prohibited act. Suárez describes the historical meaning of *non potest* or its equivalent.[14] It will not be necessary to outline his statement completely; but, in brief, Suárez says that if the interpretation of Roman law (*lex non dubium*) is followed, *non potest* will signify invalidity; if, however, Roman law be not adopted in canon law, the clause need not be accepted as indicating invalidity. Van Hove[15] makes a similar analysis of the use of this clause. After mentioning that in Roman law every prohibited act was also invalidated, he states that of itself the *non potest* clause merely prohibits an act. It does not invalidate or disqualify. Van Hove cites canon 524, § 2, as support for his opinion.[16]

The opinion of Suárez and Van Hove must be accepted. Today canon law definitely requires an invali-

dating clause before a prohibitory law can invalidate an act or disqualify a person. Hence it is inadmissible today to claim that any clause which actually prohibits necessarily invalidates or disqualifies. The obligation, of course, to omit the prohibited act remains.

But is it always necessary for invalidation that some additional and clearly invalidating word be found with the clause *nequit,* etc., before it can invalidate or disqualify? Could the clause of itself be used to prohibit and invalidate an act which is not within the competence of the subject of the law? For instance, if a bishop is forbidden to do something which is actually beyond the competence of his office, would his act be valid?

To answer these questions it is necessary to recall some principles of public ecclesiastical law. For purposes of illustration the episcopate will be used. In the constitution of the Church the office of the subordinate episcopate[17] is established within the limits of definite powers. Usually these powers are territorially circumscribed.[18] Even if these powers are not thus limited, a bishop's power is not universal. Consequently, his power is essentially limited by his office, and any act beyond the competence of this office would be invalid. This is true whether or not he is actually forbidden to perform the act in question. The only way in which such an act could be valid would be by concession of additional power by the Pope.

However, within the competence of his office, a bishop is fundamentally able to act. He may be forbidden so to act; but this prohibition, unless strengthened by a clearly invalidating clause, would not be more than a directive law. It is difficult to see how a mere prohibition should have greater effect in such an instance than in the case of any other merely prohibitory

law. Of course, the prohibition could be enforced with invalidation, but this fact must be established.

In considering, then, the force of a *nequit* clause, it is necessary to keep in mind two items. First, if the clause contains a clearly invalidating word,[19] the act is invalid no matter what the source of the bishop's jurisdictional power may be. The Pope has the power to forbid with invalidation any act of a bishop's jurisdiction. Secondly, if no clearly invalidating word is contained in the clause *nequit,* etc., the validity of the act is to be judged by the source of the jurisdictional power.[20] If the prohibited act is within the competence of the episcopal office,[21] it is a valid but unlawful act. If, however, the prohibited act is beyond the competence of the episcopal office,[22] it is not only an unlawful but also an invalid act. When prohibited acts of doubtful competence are performed, they must be considered as valid acts. With the proper limitations, the same explanation can be applied to other ecclesiastical offices.

Consonant with this explanation, indications will be given of the use of the clause *nequit,* etc. The canons indicated will consider all ecclesiastical offices and persons.

The clause *nequit* (*nequeunt*) is found indicating invalidity or disqualification in canons 81; 82; 113; 123; 147, § 1, with *valide;* 154, with *valide;* 157, with *valide;* 164; 167, § 1; 172, § 4; cf. also, canons 170; 179, § 2; 181, § 4; 195; 201, § 2; 222, § 1; 322, § 1; 334, § 2; 336, § 1; 374, § 2; 434, § 1, with *valide;* 493, cf. also, canons 674; 495, § 1; 500, § 3, with *nulla;* 581, § 1, with *valide;* 609, § 2; 626, § 1, § 2; 632, cf. also, canons 681; 647, § 2; 656; 666; 693, § 1, with *valide;* 699, § 2; 703, § 2, with *valide;* 704, § 1; 708; 721, § 1, with *valide;* 732, § 1; 782, § 3, with *valide;* 786, with *valide;* 913; 932; 933; 940; 1012, § 2, with (*contractus*)

*validus;* 1067, § 1, with (*matrimonium*) *validum;* 1075, with *valide;* 1080, with *valide;* 1140, § 1; 1281, § 1, with *valide;* 1316, § 2, with *valide;* 1417, § 2, with *valide;* 1429, § 3; 1436, with *valide;* 1447; 1453, § 1, with *valide;* 1459, § 2, with *valide;* 1462; 1487, § 1; 1494; 1571; 1573, § 2; 1634, § 1; 1653, § 3, § 6; 1656, § 1; 1682; 1683; 1835; 1843, § 1; 1891, § 1; 1927, § 1, with *valide,* cf. also, canons 1930; 1958; 2014, with *valide;* 2027, § 2; 2095; 2146, § 3, with *valide;* 2163, § 1; 2236, § 3; 2237, § 1; 2250, § 2; 2282; 2303, § 3; 2363. Other uses of *nequit,* etc., do not bind under invalidity.[23]

7. *Nisi.* This clause is frequently reduced to an essential condition and is used in much the same sense as *dummodo.* Moreover, it frequently accompanies an invalidating word, and the invalidating effect will be removed if the condition mentioned in the clause which *nisi* introduces, is fulfilled. Hence much depends upon the meaning of the principal clause in the law. Once this is known, the force of *nisi* is to set up a different prescription. Extreme care, then, must be used to learn where the force of this word is found. The following canons are given as examples of the different uses of *nisi:* integra manent, nisi — canon 4; rescripta . . . exsecutioni mandari possunt, . . . nisi — canon 58; nulla rescripta revocantur, nisi — canon 60, § 2; actus . . . valent, nisi — canon 103, § 2; actus valet, nisi — canon 104; suffragium . . . exquiratur, nisi — canon 168; potest . . . delegare, nisi — canon 199, § 1; subdelegari potest, . . . nisi — canon 199, § 2; nulla . . . potest . . . subdelegari, nisi — canon 199, § 5; nullam habet potestatem . . . nisi — canon 309, § 2; nulla . . . domus erigatur, nisi — canon 496; ii . . . dimittere nequeunt, nisi — canon 647, § 2; praeberi non potest nisi — canon 940, § 1; iterari non potest, nisi — canon 940, § 2; beneficium . . . con-

ferri non potest, nisi — canon 1447; nullum ius . . . admittatur, nisi — canon 1454; religiosus admitti potest, nisi — canon 1657, § 3; nisi . . . procurator non potest renuntiare — canon 1662; ius . . . actione munitur, nisi — canon 1667; actor potest . . . cumulare . . . nisi — canon 1670, § 1; nullitas . . . declari non potest . . . nisi — canon 1682; proponenda est iudici . . . nisi — canon 1692; actio non admittitur nisi — canon 1695, § 2; tempus utile . . . est triennium, nisi — canon 1703; nec iteretur necesse est, nisi — canon 1714; interrumpitur praescriptio, nisi—canon 1725, 4°; mutari non potest, nisi — canon 1729, § 4; nec . . . admittatur, nisi — canon 1764, § 4; plenam fidem non facit, nisi — canon 1791, § 1; vim probandi . . . non habent, nisi — canon 1819; non potest . . . nisi — canon 1843, § 1; non ultra, . . . nisi — canon 1847; constare non censetur, nisi — canon 1905, § 2; decreta . . . ferri nequeunt, nisi — canon 1958; nullus iudex inferior potest . . . instruere, nisi — canon 1963, § 1; nullam causam . . . definere potest, nisi — canon 1970; nec aliae sunt admittendae, nisi — canon 2019; Ordinarius . . . transferre nequit, nisi — canon 2163, § 1; poena . . . non incurritur, nisi — canon 2228; nulla poena infligi potest, nisi — canon 2233, § 1; nemo est vitandus, nisi — canon 2258, § 2; actus . . . non est nullus, nisi — canon 2265, § 2; excommunicatus nequit . . . valide consequi, nisi — canon 2265, § 2; datur appellatio . . . nisi — canon 2287; iura . . . non amittuntur, nisi — canon 2296, § 2.

8. *Oportet.* This clause indicates necessity. It is used several times in the Code of Canon Law for validity: oportet ut decimum sextum aetatis annum expleverit — canon 573; accedat oportet Ordinarii consensus — canon 1459, § 2; iam receperit oportet — canon 1474. It is also used where no validity of an act is involved.[24]

9. *Requiritur* (*requiruntur*). This clause is sometimes found alone, but at other times with another clause. The significance of this clause can at times be reduced to a condition of necessity. Whenever permission is required for an act, the validity of this act, when performed without such permission, must be determined by an analysis of the power contained in an office. Hence, much of the argument which was outlined earlier in regard to the clause *nequit,* etc., will also be applicable here. *Requiritur* is used for validity in the following canons: 212, § 1; 321, with *ad validam* (*electionem*); cf. also, canon 329, § 3; 433, § 2, with *ad validitatem;* 492, § 1; 497, § 1, § 4; 534, § 1, with *sufficit;* 544, § 3; 572, § 1, § 2, with *ad validitatem;* 686, § 3, with *ad validitatem;* 691, § 4; 719, § 2; 723, with *ad validitatem;* 872, with *ad validam* (*absolutionem*); 1089; 1133, § 1, with *ad convalidandum;* 1133, § 2, with *ad validitatem;* 1530, § 1, 3°; cf. also, canons 1533; 1541, § 2, 1°; 1546, § 1; 1938, § 1. (N. B. Part of canon 1530 does not bind for validity.[25])
10. *Reservata* (*reservatur*), etc. This clause indicates that the matter involved in the law is entirely withdrawn from the competence of the one who may be affected by the reservation. This clause is used for validity in the following canons: 392; 394, § 2; 396, § 1; 443, § 1; 455, § 1; 1376, § 1; 1435, § 4; cf. also, canons 1434; 1487, § 3; 1517, § 1; 1557, § 2; 1573, § 2; 1576, § 1; 1598, § 3; 2114.
11. *Tantum* (*tantummodo*). This clause is used both to indicate reservation of rights and to specify which acts will be recognized as valid. It can be used, then, to disqualify other acts not mentioned in the law, as well as to establish certain legal formalities or solemnities. It is used for validity in the following canons: translatio . . . ab eo tantum perfici potest — canon 193, § 1; unam

tantum . . . habeat — canon 460, § 1; religio iis . . . tantum . . . gaudet — canon 613, § 1; tunc tantum . . . acquirunt — canon 687; adscribi tantum possunt — canon 709, § 2; eas tantum potest — canon 721, § 2; contrahunt tantum — canon 768; indulto Sedis tantum Apostolicae conceditur — canon 822, § 2; ii tantum possunt — canon 912; semel tantum in die — canon 928, § 1; supremae tantum auctoritatis — canon 1038, § 1; ea tantum matrimonia valida sunt — canon 1094; cf. also, canon 1099, § 1; canon 1095, § 1, 1°; reservata sunt tantummodo — canon 1309; causa canonica . . . ea tantum est — canon 1427, § 2; tolerari tantum possunt — canon 1452; imponere . . . Ordinarius potest tantummodo — canon 1506; eligere potest tantummodo — canon 1580, § 2; stare in iudicio . . . possunt tantummodo — canon 1650; agant tantummodo — canon 1654, § 1; valebit tantummodo — canon 1758; possunt ea tantum — canon 1999, § 3; infligi tantum debet — canon 2224, § 3; ferri tantum potest — canon 2269, § 1; clericis tantum applicantur — canon 2298; cf. also, canons 1618; 2299; 2305, § 2. This clause is also used to indicate an exhaustive list of powers, rights, conditions, etc.[26]

C. *Invalidating (disqualifying) clauses in penal law.*

The consideration of invalidating clauses in penal law as a separate item is restricted to the third part of the fifth book of the Code of Canon Law. It is this part of canon law which establishes specific penalties for specific crimes. Reference to the list given below will reveal the various inabilities and disqualifications which are punishments for crime. It is to be assumed, naturally, in this discussion that the crimes referred to are punishable in ecclesiastical law. Hence every question of imputability of crime is eliminated in this part of the study of invalidating laws.[27] Another assumption concerns the interpretation of the penalties

specified in canon law. To learn how penalties are to be interpreted the second part of the fifth book of the Code of Canon Law must be consulted.[28] Some penalties, for example, contain, among other sanctions, disqualifications, and to know all that is implied in a penalty some guide is needed. One penalty that might be mentioned as typically indicating the necessity for knowing the implications of penalties established in law is *infamy of law* (*infamia iuris*). It is a penalty specified in various canons, but it is necessary to know that one of its effects is disqualification, as explained in canon 2294, § 1.[29]

In the following list the clauses are given in their alphabetical order, as in the listing made above. Where variations of a clause occur, they will be treated as a single unit.

1. *Arceantur:* arceantur a ministerio . . . audiendive sacramentales confessiones — canon 2317; arceantur ab actibus legitimis ecclesiasticis — canon 2350, § 2.
2. *Caret:* perpetuo caret voce activa et passiva — canon 2385; ipso facto . . . pro ea vice carent—canon 2391, § 1.
3. (*a*) *Exclusus habeatur:* ipso iure exclusus habeatur ab actibus legitimis — canons 2353; 2354, § 1.
   (*b*) *Excludantur:* excludantur ab actibus legitimis — canon 2357, § 2.
   (*c*) *Exclusi manent:* ipso facto ab actibus legitimis . . . exclusi manent — canon 2375.
   (*d*) *Est exclusus:* ipso iure . . . ab actibus legitimis . . . est exclusus — canon 2385.
4. *Fructus non facit suos:* canons 2398; 2403.
5. (*a*) *Infames:* ipso facto infamis — canon 2320; ipso iure infamis — canon 2343, § 1, 2°; ipso facto infames — canons 2351, § 2; 2356; 2357, § 1.
   (*b*) *Infames declarentur* — canons 2314, § 1, 2°; 2359, § 2.
6. (*a*) *Inhabilis:* ipso facto inhabilis — canon 2390, § 2; ipso iure . . . inhabilis — canon 2394, 1°; ipso facto inhabilis — canon 2395.

(*b*) *Inhabiles . . . declarentur:* canons 2345; 2368, § 1; cf. also, canons 2369; 2413, § 1.

(*c*) *Inhabilis efficiatur:* canon 2346.

7. (*a*) *Priventur* (*privetur*)*:* voce activa et passiva . . . priventur — canon 2331, § 2; priventur . . . voce activa ac passiva — canons 2342, 2°; 2360, § 2; privetur voce activa et passiva — canon 2368, § 1.

(*b*) *Privatione:* privatione . . . vocis activae ac passivae . . . plectantur—canon 2336, § 1; puniantur . . . privatione vocis activae et passivae — canon 2389.

(*c*) *Privati sunt:* ipso facto privati sunt pro ea vice iure eligendi — canon 2390, § 2.

(*d*) *Privatur:* ipso facto privatur pro ea vice . . . procedendi — canon 2391, § 1.

(*e*) *Privati manent:* ipso facto privati . . . manent iure eligendi — canon 2392, 2°; suo iure pro ea vice ipso facto privati manent — canon 2393.

8. *Suspensi manent:* ipso facto a iure eligendi . . . suspensi maneant — canon 2394, 3°.

To complete this chapter, several other items should be mentioned. First, certain offices do not at times permit full powers to their incumbents. Vicars-general and vicars-capitular, for instance, are local Ordinaries, and yet the full power of the office of Ordinary is not always granted in law either to the vicar-general or the vicar-capitular. It is useful, then, to know where the law restricts the capacity of vicars-general and vicars-capitular.

1. *The vicar-general:* 368, § 1; 113; 152; 357, § 1; 406, § 1; 455, § 3; 477, § 1; 492, § 1; 686, § 4; 893, § 1; 958, § 1, 2°; 1104; 1283, § 2; 1285, § 1; 1303, § 3; 1414, § 3; 1423, § 1; 1432, § 2; 1466, § 2; 1487, § 1; 2220, § 2; 2314, § 2.

2. *The vicar-capitular:* 435, § 1; 113; 357, § 1; 406, § 1; 492, § 1; 686, § 4; 893, § 1; 958, § 1, 3°; 1303, § 3; 1423, § 1; 1432, § 2; 1487, § 1; 1573, § 5; 1590, § 1.

A reservation may also be attached to the office of diocesan judge.[30]

Secondly, a word should be said of the possible invalidating force of the clause *reprobata contraria consuetudine.* This clause can be used both to invalidate judicial acts contrary to the law and also to deny recognition to any practice not approved in law yet without any direct relation to a juridical act. An example of the former use is found in canon 403.[31] In this canon whatever right had been founded in custom to appoint to benefices and canonries in cathedral and collegiate churches is now abolished. Reliance on custom, then, would result in an invalid act. In canon 403, however, the superior rights of the Holy See and the constitutional law of the Chapter are preserved intact. An example of the use of this clause where a legal act is not involved is found in canon 818.[32] In this canon the practice of neglecting the rubrics is condemned. It will be necessary, then, constantly to distinguish between the two uses of the clause *reprobata contraria consuetudine.* Further examples of its use to invalidate acts are found in canons 396, § 2; 418, § 1; 433, § 1; 455, § 1; 460, § 2; 1041; 1408; 1492, § 1; 1525, § 1; 1576, § 1. Further examples can also be found where no invalidity of acts is involved.[33]

Thirdly, it will be useful to remember that rescripts in which, at times, rights are conceded are subject to the provision of canon 40.[34] According to this canon there is usually present the fundamental condition of truth. This condition has an invalidating effect if it is not realized. Proper application of this canon is made in subsequent canons in which the full force of canon 40 is mitigated.[35] Again, in reference to rescripts, one must determine which conditions bind for validity. In canon 39 the Code of Canon Law makes these conditions subject to demonstration, for it says that conditions are essential only if they are introduced by the particles *si, dummodo,* etc., which indicate this effect.[36]

Lastly, in determining the invalidity of an act in canon law it is necessary to know the prescriptions of civil law. This is essential because, in the matter of contracts, the Church adopts

the civil law unless this law is contrary to divine law or unless specific exception is made.[37] Contractual acts, then, must be studied both in canon law and in civil law before a judgment can be arrived at in regard to their validity. Of course, whenever theology or positive canon law differs from the prescriptions of civil law, canon law must be obeyed. A marriage contract, for instance, valid in civil law may be invalid in canon law.[38] Conversely, a marriage contract invalid in civil law may be valid in canon law.[39] The civil law will naturally vary in different localities. As a result, in canon law a contractual act may be valid in some places and invalid in others.

## Chapter VIII

# PLEAS BASED ON THE FORCE OF INVALIDATING LAWS

FOR the most part, the preceding discussions of invalidating laws have been made without any direct reference to remedies or legal means of recovering a right or preventing or obtaining redress for wrong, in relation to such laws. The existence, nature, division, effect, and so forth of invalidating laws have been thoroughly examined as part of a study of the laws themselves; these aspects have not, however, been closely examined as the basis upon which rights are contested or defended.

It has been amply demonstrated that an invalidating law provides that a contrary act will be null and void. This legal effect should be recognized by all. If, however, such recognition is not given, there must be some remedy at law whereby there can be a public declaration that such an act is null and void. Such a remedy should be at hand not only for a person who may be directly and immediately affected by an invalid act but also for anyone who in any legitimate way may be legally interested. The contracting parties, for instance, may not be the only persons interested in an invalid contract. Their creditors, heirs at law, and so forth, may also have a legitimate interest. Consequently, a remedy should be at hand for the protection of such interests.

Further, since procedural invalidating laws also can affect the decisions made, it is necessary that a remedy be available to protect one's interest against an invalid judicial sentence. The invalidity of a judicial sentence can occur in various ways.[1]

The Code of Canon Law is not lacking in suitable provisions both for the defense of one's rights against the effect of an invalid act and for one's defense against an invalid judicial sentence. The former provisions are found under the title "*de actionibus ob*

*nullitatem actorum,"*[2] the latter under the title *"de querela nullitatis contra sententiam."*[3] Both titles will be examined. There is no intention, however, of giving any long and detailed commentary on these canons. This can be found in any modern author who has written specifically of the fourth book of the Code of Canon Law.[4] For the purpose of this work it will be sufficient to indicate what remedies are at hand and how they will operate. This discussion will naturally fall into two separate parts: the first will consider declarations of the invalidity of acts or contracts; the second will consider the plea of nullity against an invalid judicial sentence.

*A. The declaration of an invalid act or contract.*

Canon 1679[5] says that if an act or contract is null in law (*ipso iure*) anyone who has an interest in this act or contract can obtain a judicial declaration of this nullity.

The important point to determine, in applying canon 1679, is how an act or contract is null in law. Acts or contracts may be declared null by the law itself, or their nullity may be suspended until a judicial declaration of nullity. Are all such acts included under canon 1679? Apparently not, for the canon specifically states that its application is to acts or contracts which are nullified by the law itself. No provision is made for acts whose validity might be sustained until they are rescinded in court. Therefore it must be fully remembered that canon 1679 is not a law which contemplates a possibly valid act or contract; it is, rather, a law which authorizes a judge publicly to declare null an act or contract whose actual nullity is already determined.[6]

From this interpretation of canon 1679 it should not be concluded that the ministry of the court is superfluous. The nullity of an act or contract may not always be recognized. Or, if it is recognized, refusal to accept the nullity may damage an innocent person. Or, again, the interests of a third person not directly concerned with the act or contract may be jeopardized unless there is a public declaration of nullity.[7]

These reasons and others make an appeal to the court at times necessary, or at least useful. The public declaration of nullity may frequently result in acceptance of the effect of an invalidating law in cases where the persons involved are unwilling to accept this obligation. It is, of course, true that a judicial declaration of nullity should never be necessary, but remedies must be found in law to provide for any contingency of ignorance or malice.

Canon 1680, § 1, indicates what makes an act invalid.[8] Much that could be set down as a commentary on the first paragraph of this canon has already been said. Here, it will be sufficient to enumerate with Noval[9] some of the ways in which an act can be destitute of its essential elements. This will be followed by a brief word on the solemnities of acts.

An act can be invalid because the person who performs it is incapable of acting. This incapability will arise from a defect of nature (e. g., lack of sufficient reason or will), or from a disqualification found in positive law. A person, for instance, who is not endowed with sufficient reason cannot perform a juridical act. Similarly, physical force will prevent an act from being valid. Positive law also plays an important role in disqualifying certain persons from acting legally. As far as the effect of an invalidating law is concerned, it is of no importance how the incapability of the person who performs an act arises. If he is unable to act, his act is invalid because an essential element of the act is lacking. Practical cases will come to mind at once involving invalid exercise of jurisdiction.

An act can also be invalid because the object of the transaction is either non-existent or entirely unsuitable. Objects, for instance, which are bequeathed must be in existence at the time of transfer by testament. If they are already destroyed, even though mention is made of them in a testament, the bequest is worthless. The object of a transaction may also be unsuitable, although the transaction may be a rational act and in other circumstances valid. Examples could be given here in regard

to procurators, agents, etc. The important thing to keep in mind, however, is that the object of the transaction must be clearly in line with the entire act. If, for instance, a person is authorized to purchase one thing, similar authorization cannot be claimed by the same act of authorization to purchase another and even better object.

The solemnities for acts mentioned in canon 1680, § 1, are compared to conditions. The necessity for these solemnities or conditions has been repeatedly asserted. This necessity is superimposed upon the existence of the essential elements of an act. The solemnities are the prescriptions of positive law which bind for validity only if the law makes this stipulation. Invalidity of an act because of the lack of solemnities or conditions is not to be presumed. Such invalidity must be demonstrated by the clear and definite prescription of law.

The canon uses the phrase *sub poena nullitatis*. But as established earlier and as Roberti[10] says, nullity is not regularly a penalty. The effect of nullity does not, then, presuppose subjective responsibility, but is present whenever solemnities demanded by law for validity are lacking.

The second paragraph of canon 1680 establishes the relationship between an invalid act and other acts involved in the same case.[11] The canon clearly states that no act which precedes an invalid act is, by virtue of the invalidity of the latter act, invalid. This is obvious and requires no discussion. The same thing is not always true, however, of an act performed subsequently to the invalid act. This subsequent act may exist independently of the invalid act and follow it only in the order of time. In such a case, this subsequent act is not invalid, for then it merely follows the performance of an invalid act. If, however, the subsequent act depends on the invalid act, it is likewise invalid. This is the invalidity which is called "derived" (*derivata*).[12] To establish such invalidity it is unnecessary to examine the essential elements which constitute the act. It is equally unnecessary to prove the lack of solemnities. All that need be established is that the sub-

sequent act is dependent on the preceding invalid act. Thus an entire judicial process can be invalid if the initial act is invalid. On the other hand, if the testimony of one person is invalidly accepted, the testimony of another in the same case is not thereby invalidated, because neither act depends on the other. It is scarcely necessary, then, to stress the importance of exercising extreme care in judicial processes, especially in the initial acts of the case. The entire process is invalid if the initial act is and remains invalid.[13] The same extreme care is necessary in summoning the various necessary officials of the court.[14]

Of itself the court is not always free to declare an act invalid. Unless public interest is involved or the invalid act pertains to the poor or to minors actually or legally such, the judge is not permitted to issue any declaration of invalidity of an act. This is the law of canon 1682.[15]

Acts of public interest will not be difficult to identify. The most obvious example is an invalid marriage.[16] An invalid religious profession may also, Coronata asserts, at times be a case of public interest.[17] Contracts, however, which are of no public interest and which are concerned only with the private good of the contracting parties, normally cannot be declared null except upon the proper plea of the parties themselves. Canon 1682 does not state which cases may be tried before the court; it does state which cases of nullity may be declared *ex officio*. It is understood that in such cases no formal plea of nullity has been submitted by the aggrieved party of the invalid act or contract.

Besides allowing a declaration of nullity *ex officio* in regard to acts of public interest in which the court is permitted to intervene, canon 1682 permits such a declaration in cases where the parties are poor. This is a wise provision, for poverty may influence a person to neglect the defense of his rights. The rights of minors are also protected by the action of the court. Similarly, persons who and corporations which in law are considered minors receive the benefit of the law.

Canon 1683 prevents any tribunal or judge lower than the Roman Pontiff himself from sitting in judgment on an act or instrument which has received the confirmation of the Pope.[18] The canon specifically states that the confirmation of the act or instrument must have been that of the Roman Pontiff. Hence, the confirmation of a Roman Congregation, Office or Tribunal would not be sufficient to invoke the force of canon 1683.[19] But there is no reason why the Roman Pontiff could not by special delegation order such confirmation as he himself could grant.[20] Nothing is said in this canon about an act or instrument performed or drawn up by the Roman Pontiff himself, but it is obvious that a judgment on such an act or instrument is beyond the competence of lower judges and tribunals.[21]

Canon 1683 permits a judgment on an act or instrument confirmed by the Pope if a mandate of the Apostolic See is obtained. This mandate must be conceded by the Apostolic See,[22] and it can be delegated.

The canons mentioned above consider the possibility of a judicial action in regard to an invalid act or contract, the determination of an invalid act, and the ministry of the court. The remaining canon under discussion orders the payment of damages and expenses by the person who performed the invalid act.[23] This canon makes no distinction between invalid acts which are the result of malice and invalid acts which are performed in good faith. Nor should such a distinction be sought in the law, as the invalid act is the cause of the damages and it is immaterial whether or not this act is malicious.[24] It must be understood, however, that the damages for which one is liable result from the invalid act. Expenses incidental to the declaration of nullity also are collectible. Other expenses, provided they are directly related to the invalid act, are likewise collectible. Such expenses might include the obtaining of professional opinions on the validity or invalidity of an act, or attempts to obtain compensation; or they might involve anything within reason which might be

needed in order to obtain justice before the case is actually brought into court.

It should be noted that the Code speaks in a general way regarding the person to whom payment of damages and expenses is to be made. While in most cases it will be the person who immediately suffers damage who is to be reimbursed, anyone who files the suit for declaration of nullity and obtains this declaration is entitled to his expenses and to possible damages. This, of course, presupposes a right to file the suit according to the prescriptions of canon 1679.

The canons which grant the right to ask for a declaration of nullity of an act or contract make no provision for such invalid acts or contracts if they are not brought to the attention of the court and at the same time are acts of private interest only. What is the status of such acts or contracts? The judge is forbidden to declare their invalidity. Can it be presumed, then, that the right conceded in canon 1679 is renounced? Yes, the common opinion is that the surrender of the right to ask for a declaration of nullity is to be presumed in such cases.[25] This is reasonable, for the right to enter a plea is conceded by law in order to protect one's rights. If this protection is neglected, it must be presumed that one renounces his right to it. Such a renunciation is possible if the invalid act is not of public interest.

Granted the renunciation of the right to ask for a declaration of nullity, the invalid act, if it can be validated, becomes a valid act. This operation is entirely outside judicial procedure. It is established by the consent of the parties who made the contract or by the silence of one who possesses an interest in the contract. As Coronata says,[26] one is forced to presume validity if subsequent acts are placed which involve the renunciation of one's right to ask for a declaration of nullity.

The right conceded by canonists to renounce a declaration of nullity must be carefully distinguished from the surrender of rights considered in an earlier chapter.[27] There a surrender of

rights was rejected as a reason alleged as excusing from the obligation of invalidating laws. And it was also pointed out that such surrender is impossible whenever the public welfare is involved. This is confirmed by the law of canon 1682, which permits an official declaration of nullity in cases in which the public interest is a concern. Aside from cases in which the public interest is involved and from the other exceptions noted in canon 1682, acts and contracts entered into invalidly remain within the sphere of private interest. A right is at hand if one chooses to use it, and when this right is used, the judge will declare such an act or contract invalid. But if one chooses instead to neglect this right, he must be presumed to renounce it. This presumption, then, leads to a conviction that the invalidity of the act or contract has been rectified by the parties themselves.

B. *The plea of nullity against an invalid judicial sentence.*

The provisions regulating an appeal of nullity against a judicial sentence are considered in canons 1892-1897.

The Code establishes two kinds of nullity: irremediable nullity (*nullitas insanabilis*) (c. 1892) and remediable nullity (*nullitas sanabilis*) (c. 1894). The citing of each kind of nullity is immediately followed by a prescription indicating when such an appeal of nullity can be made (cc. 1893, 1895). The title "de querela nullitatis contra sententiam" closes with the concession of the right to a change of judges in instances where justice may thus be better obtained (c. 1896), and the concession of the right of appeal to promoters of justice and defenders of the bond (c. 1897, § 1). The last canon under the title also includes a provision for the judge to retract his invalid sentence and to correct it (c. 1897, § 2).

The Code does not define either irremediable nullity or remediable nullity. Noval states that the difference between the two kinds of nullity is found in the fact that matters of private interest can be renounced while matters of public interest cannot

be. To the latter classification Noval adds matters of private interest which are not subject to renunciation.[28] Roberti denies that the possibility of renunciation is the foundation for the difference between the two kinds of nullity. He claims that the difference must be sought in the time at which an appeal of nullity is concluded.[29] Wernz and Vidal agree with Noval.[30] Cappello states the two different opinions, but he criticizes the opinion held by Roberti as being devoid of juridical foundation.[31] The question is of theoretical importance only. But it seems that Noval's opinion is preferable.

While the Code does not define the two kinds of nullity, it does state definitely when they occur.

1. *Irremediable nullity.*

Canon 1892 states the instances in which a sentence is irremediably null.[32] The first instance occurs when a judge is absolutely incompetent.[33] Absolute incompetence is ruled upon in canon 1558.[34] Hence any judge or tribunal that would presume to pass sentence contrary to this canon would be acting altogether invalidly. A similar irremediable nullity attaches to a sentence given by a tribunal deficient in the required number of judges.[35] Canon 1576, § 1, 1°, provides that three judges sit as a collegiate body in contentious cases involving the bond of sacred ordination or Matrimony; in cases involving the rights and temporal goods of cathedrals; in criminal cases involving the penalty of privation of an irremovable benefice or the sentence of excommunication. Canon 1576, § 1, 2°, provides that five judges sit in cases which concern crimes involving the penalty of perpetual privation of the ecclesiastical garb and in cases involving deposition and degradation.[36]

Another instance of irremediable nullity occurs when at least one party has no right to stand in court.[37] Those who are under the punishment of excommunication furnish an example of this incapacity to plead a case.[38] Minors acting in their own name would likewise normally be excluded from court.[39]

The last instance of irremediable nullity mentioned in canon 1892 is that of acting without a legitimate mandate.[40] The law controlling the issuance of a mandate so that a procurator can be substituted in court, is contained in canons 1655-1666.[41]

Cappello discusses the question of whether the list of cases contained in canon 1892 is complete. In his discussion he maintains that other items also can cause irremediable nullity.[42] He offers as an example a sentence pronounced by one who was not actually a judge. Roberti is also inclined to consider the list of cases in canon 1892 incomplete. He claims that there are other items which will nullify a judge's sentence.[43] He warns, however, that some of the items he proposes can be validated by the parties themselves.

In considering Cappello's question, one must remember that canon 1892 is citing irremediable nullities established by positive law. Other nullities in positive law may lead to an invalid sentence — for example, those mentioned in canon 1585, § 1[44] — but these do not immediately concern the nullity of the judge's sentence, which is here under discussion. Other nullities, too, may be found in natural law — for instance, those cited in canon 1861, § 2[45] — but again these do not immediately concern the judge's sentence. It might be maintained that since the Code does not enumerate other cases of irremediable nullity of the judge's sentence, the legislator intended to exclude them. The opposite opinion, however, is tenable.

The effect of irremediable nullity is that the entire process is invalid. The process must be repeated from the beginning if this is possible. The nullity resulting from the defect of the mandate can be validated by a new process with a legitimate mandate. Other cases enumerated in canon 1892 can also be retried with conditions properly fulfilled, such as the correct number of judges or the regained status of a party in court. Nullity, however, resulting from absolute incompetence is final until proper competence is obtained from the Holy See.

After determining which sentences are irremediably invalid, the Code states in canon 1893 how long the right to attack such sentences remains. The law makes a distinction between two kinds of pleas (*exceptio* and *actio*). A legal *exception* to an invalid sentence is enjoyed in perpetuity.[46] Hence, for instance, if a person is condemned by a sentence irremediably invalid, he can always resist execution of this sentence,[47] and refuse to pay the judgment passed against him. The right to legal *action* against an irremediably invalid sentence persists for thirty years from the day the sentence was published.[48] Hence an appeal against a sentence irremediably invalid need not be quickly made. Canon 1893 speaks of the legal action being presented before the judge who passed the sentence. Obviously, the expression "*coram iudice qui sententiam tulit*" refers not to the physical person of the judge but to the court itself.[49]

2. *Remediable nullity.*

Canon 1894 contains a list of cases in which the sentence is remediably invalid. Four cases are mentioned. A brief word of explanation of each will be given.

The first case in which a sentence is remediably invalid occurs whenever the summons or citation is not legitimate.[50] Invalidity of the sentence will result if the defendant is not summoned at all, or if the citation is devoid of the necessary formalities.[51] The necessity of formalities is eliminated if both parties freely appear before the court.[52]

The second case of remediable nullity occurs if the sentence does not contain the reasons why it has been thus pronounced. An exception to this part of canon 1894 concerns the decisions of the Apostolic Signatura.[53]

The third case of remediable nullity occurs if the sentence lacks the required signatures.[54] The signature of the judge (or of all judges, if more than one) who tried the case is required. The signature of the notary is also required.[55]

The last case of remediable nullity occurs if the year, month, day and place of the sentence are not indicated.[56]

The time allotted for an appeal against a remediably invalid sentence is not as long as the time granted for an appeal against an irremediably invalid sentence.

Canon 1895 considers two kinds of pleas. One is the plea which can be proposed together with a legitimate appeal from the sentence. The time allotted for this plea is ten days.[57] The other is the plea which can be made directly to the court that passed the sentence and this must be made within three months of the day on which the sentence was published.[58] Again in canon 1895 it is the court which passed the sentence that is understood as receiving the appeal or plea, not the physical person who actually decided the case.[59]

The right to file a plea of nullity against a remediably invalid sentence is granted to all who are parties in the case. This includes the promoter of justice and the defender of the bond.[60]

The effect of a remediably invalid sentence depends on the matter which caused this invalidity. If the sentence is invalid because of lack of legitimate citation or summons, the whole process is invalid and must be repeated according to law. If, however, the sentence is invalid because of some omission of a formality required by law, the judge himself can correct this defect.[61]

Since the defects enumerated in canon 1894 are remediable, they can be corrected in various ways. As was just mentioned, the judge can frequently correct these defects. Acquiescence of the parties involved can also correct them. This acquiescence is presumed if an appeal is not made within the time prescribed by law. The defect of the sentence as first given can also be corrected by the sentence of the appellate court.[62]

The Code of Canon Law wisely provides for cases in which there is fear that a judge will be reluctant to accept a plea of nullity against his own sentence. This plea is founded on a right conceded by law, but the legislator feels that this right

may not always be freely exercised before the judge who passed the invalid sentence. Consequently canon 1896 provides that another judge, in the same judicial grade, be substituted whenever it is feared that the prejudices of the judge who passed the invalid sentence will hinder the accomplishment of justice.[63]

The right conceded in canon 1896 does not require for its exercise any cause other than fear that the obtaining of a just sentence may not be realized before the judge who passed the invalid sentence.[64] The entire estimation of this fear rests with the judgment of the person who desires to place a plea of nullity. This fear, moreover, need not be directly demonstrated before it is accepted as a legitimate reason for substituting another judge. Hence it is not necessary to prove that a judge is determined to thwart the plea of nullity and is, therefore, legally suspect.[65]

The person, then, who desires to place a plea of nullity but fears the ministry of the judge who passed the invalid sentence can demand that another judge be substituted. This substitution does not change the grade of the trial. Another judge in the same court must be substituted. The substitution follows the law of canon 1615. The Ordinary will provide the substituted judge.[66]

# REFERENCE NOTES

## CHAPTER I——

1. E. g., Gommarus Michiels, *Normae generales Iuris Canonici* (Lublin, 1929), I, 267.

2. E. g., Amleto G. Cicognani, *Commentarium ad librum I Codicis* (Romae, 1925), p. 89; Philippo Maroto, *Institutiones Iuris Canonici* (Romae, 1921), I, 222; Guidus Cocchi, *Commentarium in Codicem Iuris Canonici,* 2nd ed. (Taurinorum Augustae, 1921), I, 88; Alphonsus Van Hove, *De legibus Ecclesiasticis* (Mechliniae-Romae, 1930), p. 167; Felix Cappello, *Summa Iuris Canonici* (Romae, 1936), I, 60; cf. Georg Graf, *Die leges irritantes et inhabilitantes in Codex Iuris Canonici* (Paderborn, 1926), pp. 13-14; Jacobus Zallinger, *Institutiones iuris naturalis et Ecclesiastici publici* (Romae, 1823), III, 228.

3. Cf. also, cc. 1068, § 1; 1069, §1; 1076, § 1.

4. Cocchi, *o. c.,* I, 90, says: "ut lex irritans habenda sit poenalis requiritur expressam rationem poenae eam habere."

5. Cf. c. 729; also, c. 185.

6. E. g., cc. 112; 116; 169; 170.

7. Cf. c. 16, § 1.

8. E. g., cc. 167; 1439, § 1.

9. Michiels, *o. c.,* I, 268; cf. also, Amleto G. Cicognani, *Canon Law,* revised edition (Philadelphia, 1935), p. 558.

10. Cf. Graf, *o. c.,* pp. 17-21.

11. Cicognani, *Canon Law,* p. 558.

12. "Ea tantum matrimonia valida sunt quae contrahuntur coram parocho, vel loci Ordinario vel sacerdote ab alterutro delegato et duobus saltem testibus," etc.

13. Cicognani, *Canon Law,* p. 558.

14. "Vir ante decimum sextum aetatis annum completum, mulier ante decimum quartum item completum, matrimonium validum inire non possunt."

15. "Affinitas in linea recta dirimit matrimonium in quolibet gradu; in linea collaterali usque ad secundum gradum inclusive."

16. For dispensation, etc., see Edward M. Reilly, *The General Norms of Dispensation* (Washington, 1939).

17. Charles Augustine, for instance, in *A Commentary on the New Code of Canon Law,* 3rd ed. (St. Louis, 1920), I, 84, uses the word "nullifying" to indicate both kinds of invalidating laws; Cicognani, however, uses "invalidating law" for "lex irritans," and "disqualifying law" for "lex inhabilitans"; see *Canon Law, loc. cit.;* Cocchi says (p. 90): "Ad leges irritantes reduci possunt leges constitutivae iuris, quae nempe ius aliquod constituunt vel conferunt." As examples of such laws he gives "religious profession," "the rights of canons to distributions," and "the active and passive right in elections."

18. E. g., Glossa, Panormitanus, Bartolus, Baldus, Decius, in Franciscus Suárez, *Tractatus de legibus ac Deo legislatore* (Neapoli, 1872), lib. V, cap. XIX, n. 6.

19. E. g., Joannes Andreas, Felinus Sandaeus, in Suárez, *o. c.,* lib. V, cap. XIX, n. 3.

20. Suárez, *o. c.,* lib. V, cap. XIX, n. 1.

21. By "penal law" or "penal nature of invalidating laws" is not meant what the somewhat common use of these terms now conveys: that the law carries no obligation in conscience. A penal law in this sense is totally different from the "penal law" or "penal nature of invalidating laws" as employed in the text. These latter do oblige in conscience.

22. Enricus Pirhing says that invalidation is not, properly speaking, a penalty; cf. *Ius Canonicum* (Dilingae, 1674), lib. I, tit. II, sect. I, § 6 L: "Irritatio actus proprie non est poena, quae supponit culpam, sed damnum quod ex legitima causa, etiam ab ignorante bona fide et invincibiliter sustinere debet." As an example Pirhing offers the invalidation of contracts: the contract is invalid but there is no penalty for breaking the law.

23. Cf. c. 1075; cf. Suárez, *o. c.,* lib. V, cap. XIX, n. 8.

24. Cf. c. 132, § 1; 1072.

25. C. 20, X, *de rescriptis,* I, 3.

26. "Qui . . . falsitatem exprimunt vel supprimunt veritatem, in suae perversitatis poenam nullum ex illis literis commodum consequantur."

27. C. 2, X, *de rescriptis,* I, 3; cf. also, the law of Pope Lucius III, cc. 7, 10, 11, X, *de rescriptis,* I, 3; Pope Innocent III also wrote to the Archbishop of Milan insisting on the requirements for a valid rescript; cf. c. 17, X, *de rescriptis,* I, 3; other decretals of the same Pope are found in cc. 22, 26.

28. Cf. Philippus De Angelis, *Praelectiones Iuris Canonici* (Romae, 1877), lib. I, tit. III, pp. 67-69.

29. C. 30, X, *de rescriptis,* I, 3.

30. C. 2, *de immunitate ecclesiarum, coemeteriorum et aliorum locorum religiosorum,* III, 23 in VI. An English translation of this decretal and of others whose source is actually a general council can be found in *Disciplinary Decrees of the General Councils,* by H. J. Schroeder, O. P. (Herder, St. Louis, 1937).

31. "Processus iudicum saecularium, ac specialiter prolatae sententiae in eisdem locis omni careant robore firmitatis."

32. An earlier decretal on the prohibition of civil jurisdiction in a church can be found in c. 1, X, *de immunitate ecclesiarum,* etc., III, 49.

33. C. 27, *de electione et electi potestate,* I, 6 in VI.

34. "in poenam praesumptionis illius electio eadem ipso facto viribus vacuetur omnino."

35. C. 28, *de electione et electi potestate,* I, 6 in VI.

36. C. 36, *de electione et electi potestate,* I, 6 in VI.

37. C. 45, *de electione et electi potestate,* I, 6 in VI.

38. E. g., c. 43, X, *de rescriptis,* I, 3; c. 2, X, *de postulatione praelatorum,* I, 5; c. 16, X, *de regularibus et transeuntibus ad religionem,* III, 31; c. 4, 11, X, *de privilegiis et excessibus privilegiatorum,* V, 33; c. 3, X, *de poenis,* V, 37; c. 2, *de censibus, exactionibus et procurationibus,* III, 20 in VI; cf. also cc. 23-25, C. XXV, q. 2. These latter examples are earlier than the decretals.

39. C. 5, *de electione et electi potestate,* I, 6 in VI.

40. "Avaritiae caecitas et damnandae ambitionis improbitas aliquorum animos occupantes, eos in illam temeritatem impellunt, ut quae sibi a iure interdicta noverint exquisitis fraudibus usurpare conentur."

41. *Novellae constitutiones Imperatorum Theodosii II, Valentiniani III, Maximi, Maiorioni, Severi, Anthemii* (Romae, 1844), tit. IX: "Ne curialis praedium alterius conducat aut fidejussor conductoris existat."

42. "Non dubium est in legem committere eum, qui verba legis amplexus, contra legis nititur voluntatem."

43. "Nec poenas insertas legibus evitabit, qui se contra iuris sententias scaeva praerogativa verborum fraudulenter excusat."

44. "Nullum enim pactum, nullam conventionem, nullum contractum inter eos videri volumus subsecutum, qui contrahunt lege contrahere prohibente."

45. "Quod ad omnes legum interpretationes, tam veteres quam novellas trahi generaliter imperamus, ut legislatori, quod fieri non vult, tantum prohibuisse sufficiat."

46. C. I, 14, 5. An English translation of this text is found in *The Civil Law,* translated by S. P. Scott (Cincinnati, 1932), XII, 87.

47. Cf. Suárez, *o. c.,* lib. V, cap. XXVIII, nn. 1-9. Suárez offers a detailed study and comparison of the laws of Theodosius II and Justinian. His conclusion, briefly, seems to be that the law of Theodosius II was penal but Justinian's was not. Suárez apparently reaches this conclusion from the fact that Justinian abstracted from the particular case for which Theodosius II enacted his law. Later in the same chapter (n. 13), however, Suárez says, "Ostendimus irritationem introductam per legem non dubium, poenalem esse." This seems to be a contradiction of the general trend of his argument. But it is certain that Suárez taught that an invalidating law as such is not a penal law (cf. lib. V, cap. XIX). Perhaps, in discussing Justinian's law, Suárez found it impossible to prescind from the initial words of this law, which did concern fraud.

48. *O. c.,* lib. V, cap. XIX.

49. *Ibid.,* n. 5.

50. *Ibid.,* n. 6.

51. *Ibid.,* n. 8.

52. *Ibid.,* n. 7.

53. For the earlier law on the alienation of church property, see C. XII, q. 2.

54. C. 2, X, *de rebus Ecclesiae alienandis vel non,* III, 13: "Irrita habeantur, quae obtinent."

55. C. 6, X, *de rebus Ecclesiae alienandis vel non,* III, 13.

56. C. un., *de rebus Ecclesiasticis non alienandis,* III, 4, in Extravag. com.

57. "Si quis autem contra huius nostrae prohibitionis seriem de bonis et rebus eisdem quicquam alienare praesumpserit: alienatio, hypotheca, concessio, locatio, conductio et infeudatio huiusmodi, nullius omnino sint roboris vel momenti, et tam qui alienat, quam is qui alienatas res et bona praedicta receperit, sententiam excommunicationis incurrat." For a commentary on this decretal of Paul II, see Joseph F. Cleary, *Canonical Limitations on the Alienation of Church Property* (Washington, 1936), pp. 49-53.

58. *L. c.,* n. 4.

59. "primo directe aliquid constituendo et praecipiendo, et solum per consecutionem, seu indirecte prohibendo et irritando."

60. "Alius modus directe irritandi actum est negativus, seu prohibitus actus cum verbis sufficientibus ad irritandum illum."

61. *Disputationum de sancto Matrimonii Sacramento libri decem* (Venetiis, 1612), vol. I, lib. II, disp. IV, nn. 8-10.

62. C. 4, D. III, *de poenitentia.*

63. "Poena proprie dicitur laesio, quae punit et vindicat quod quisque commisit."

64. "Ille igitur poenam tenet, qui semper punit quod commisisse dolet."

65. *L. c.,* n. 9.

66. E. g., Decius, in Suárez, *l. c.,* n. 2.

67. *L. c.,* n. 2.

68. *Ibid.,* n. 4.

69. *Ius Canonicum universum complectens tractatum de regulis iuris* (Parisiis, 1864), reg. 64.

70. "Quae contra ius fiunt, debent utique pro infectis haberi."

71. *Codex Justinianus* (Berolini, 1929), I, 14, 5.

72. *O. c.,* lib. I, tit. II, *de constitutionibus,* § XI.

73. After establishing the necessity of an invalidating law, Reiffenstuel says: "Accedit ratio, quia potestas aeque necessaria est in legislatoribus ad bonum gubernium reipublicae, sicut potestas quidpiam prohibendi, subditosque obligandi: ut sic impiis malitiosorum machinationibus eo potentius cassatisque ipsorum perniciosis actibus proborum indemnitas, et tranquillus reipublicae status conservari valeat" (*l. c.,* n. 239).

74. *O. c.,* lib. III, tit. XIII, *de rebus Ecclesiae alienandis vel non.*

75. Cf. c. 1075, 3°.

76. *O. c.,* cap. XIX.

77. *O. c.,* v. I, lib. II, disp. IV.

78. *Scientia Canonica et Hieropolitica* (Lugduni, 1670), lib. IV, cap. VIII, n. 9.

79. "Factum irritans — lex odiosa."

80. *De regulis iuris* (Antverpiae, 1666), reg. 64, n. 5.

81. "Poena nullitatis non est proprie poena cum non sit diminutio patrimonii vel iuris quaesiti."

82. *Tractatus de nullitatibus* (Neapoli, 1678), rubrica I, q. I, n. 15.

83. "Nullitas est: vitium, seu defectus rei gestae, proveniens ob legis transgressionem."

84. "In odium et poenam transgressorum" (*o. c.,* q. 2, n. 8).

85. *Opera omnia: De testamentis* (Coloniae Allobrogum, 1679), prima rubrica, #14.

86. *O. c., De testamentis,* cap. IX, n. 4.

87. *Ibid.,* cap. X, n. 13.

88. *Ius Canonicum universum* (Venetiis, 1729), lib. I, tit. II, q. 132.

89. "Sunt enim tales leges potius favorabiles, non obstante quod aliquando per eas graventur contrahentes, lege non intendente hoc gravamen per se, sed solum bonum publicum et rectam reipublicae administrationem, ob quam aliqua onera Respublica imponere potest civibus."

90. *Ius decretalium* (Prati, 1913), I, 132-134.

91. X, *de eo, qui duxit in matrimonium quam polluit per adulterium,* IV, 7.

92. C. 27, *de electione et electi potestate,* I, 6 in VI.

93. *O. c.,* lib. I, tit. II, p. 42.

94. *Ibid.,* p. 45.

95. *L. c.*

96. "Inhabilitatio proprie dicta poena non est."

97. E. g., Suárez, *o. c.,* lib. V, cap. XIX, n. 8.

98. Cf. cc. 1684-1689; 1904-1907.

99. Cf. c. 1688.

100. Jacobus Zallinger, *Institutionum Iuris naturalis et Ecclesiastici publici,* II, 231.

101. For a commentary on canons of the Code on recissory actions and judgments, see *Restitutio in integrum* by Thomas J. Feeney (Washington, 1941).

CHAPTER II ——

1. According to their fundamental concept, invalidating laws should first of all be considered as penal or non-penal. This division was investigated in the first chapter. Cf. Suárez, *o. c.,* lib. V, cap. XIX, n. 1.

2. *O. c.,* I, 270.

3. *O. c.,* I, 234.

4. Cf. Graf, *o. c.,* pp. 15-22.

5. *O. c.,* lib. I, tit. II *de constitutionibus,* XI, nn. 240-241, 243.

6. Sess. XXIV, c. 1, *de reformatione Matrimonii.* An English translation of this canon (pp. 183-184) and of other canons of the Council of Trent can be found in *Canons and Decrees of the Council of Trent,* original text with English translation by Rev. H. J. Schroeder, O. P. (St. Louis, 1941).

7. Cf. infra, p. 75.

8. Matthaeus Conte A. Coronata, *Institutiones Iuris Canonici* (Taurini, 1928), I, 22.

9. Adrien Cance, *Le Code de Droit Canonique* (Paris, 1927), p. 48.

10. *O. c.,* I, 89.

11. Vitus Pichler, *Epitome Iuris Canonici* (Venetiis, 1755), pars prior, pp. 54-55.

12. Pichler gives these clauses as indicating a law which alone will invalidate an act: "Irritus sit, non valeat, robur non habeat, pro infecto habeatur, nullam obligationem inducat, teneatur acceptum restituere in conscientia."

13. Pichler uses these clauses to indicate that a judge is to declare an act invalid: "irritetur, annuletur, rescindatur, pronuncietur nullus."

14. Zallinger, *Institutionum iuris naturalis,* vol. II, lib. III, § 257, f.

15. *Ibid.,* note 4.

16. Cf. p. 96.

17. Franciscus Schmalzgrueber, *Ius Ecclesiasticum universum* (Romae, 1834), tom. I, lib. II, § 1, n. 5.

18. *O. c.,* pp. 234-236.

19. Cf. *ibid.,* p. 234. This division considers the effect of an act in the internal and the external forum.

20. E. g., Michiels, *o. c.,* I, 271; Coronata, *o. c.,* I, 21.

21. Cf. c. 1475.

22. *O. c.,* I, 268-270.

23. *O. c.,* pp. 164-166.

24. Cf. Maroto, *o. c.,* p. 234.

25. *O. c.,* I, 21.

26. *O. c.,* p. 165.

27. *Commentarium,* p. 90.

28. *O. c.,* I, 88-89.

29. *O. c.,* I, 84.

30. *Corso di Diritto Ecclesiastico* (Padova, 1930), p. 43.

31. *Code du Droit Canonique* (Arras, 1929), p. 5.

32. *Institutions Canoniques* (Paris, sine anno), I, 2.

33. *O. c.,* p. 48.

34. *Grundzüge des katholischen Kirchenrechtes,* 3rd. ed. (Graz, 1924), p. 32.

35. E. g., Reiffenstuel, *l. c.,* n. 245; Michiels, *o. c.,* I, 269.

36. *L. c.*

37. *Ibid.,* footnote 2.

38. *Ibid.,* p. 268.

39. "Clericus vero . . . ad alia [beneficia] quaelibet inhabilis efficiatur. . . ."

40. "Si quis ex vocandis neglectus et ideo absens fuerit, electio valet, sed ad eius instantiam debet, probata praeteritione et absentia, a competente Superiore irritari," etc.

41. "Excardinatio . . . effectum non sortitur nisi . . . ," etc.

42. "Nequeunt suffragium ferre: § 1, 2° — Impuberes," etc.

43. "Ea tantum matrimonia valida sunt," etc.

44. Cf. canon 185.

45. "Nequeunt suffragium ferre: Censura vel infamia iuris affecti, post sententiam tamen declaratoriam vel condemnatoriam."

46. "Inter virum raptorem et mulierem, intuitu matrimonii raptam . . . nullum potest consistere matrimonium."

47. "Licentia legitimi Superioris, sine qua alienatio invalida est."

48. "Officium vacans per renunciationem . . . nequit ab Ordinario . . . valide conferri suis aut resignantis familiaribus," etc.

49. "Firmis poenis in simoniacos iure statutis, contractus ipse simoniacus . . . omni vi caret. . . ."

50. "Clerici in maioribus ordinibus constituti a nuptiis arcentur," etc.; "invalide matrimonium attentant clerici in sacris ordinibus constituti."

51. "Renuntiatio, ut valida sit, fieri debet a renuntiante aut scripto aut oretenus coram duobus testibus," etc.

52. Cf. Van Hove, *o. c.,* p. 166.

CHAPTER III ——

1. Cf. p. 27.

2. Reiffenstuel, *o. c.,* tit. I, *de constitutionibus,* § XI, n. 239.

3. Suárez, *o. c.,* lib. V, cap. XIX, n. 1; for the invalidating force of natural law, see *ibid.,* lib. II, cap. XII.

4. Conc. Trid., Sess. XXIV, *de reformatione matrimonii,* c. 1.

5. Sanchez, *o. c.,* lib. II, disp. IV, n. 1.

6. For a modern treatise on the power of the Church to enact invalidating laws affecting marriage, see Peter Cardinal Gasparri, *Tractatus Canonicus de Matrimonio,* editio nova (Typis Polyglottis Vaticanis, 1932), I, 137-145; cf. cc. 1038-1041.

7. A complete discussion of the Church's right to invalidate marriage consent can be read in Sanchez, *l. c.,* nn. 1-7, 10. Sanchez also writes at length of the power of the Pope and Bishops and of the power of the State to legislate on matrimonial impediments; cf. *o. c.,* lib. VII, disp. I, II, III. An interesting discussion is found in disp. IV, where Sanchez considers the force of custom in introducing invalidities of acts and in abolishing invalidities established by law.

8. *O. c.,* n. 153.

9. Cf. c. 1529.

10. Cf. Graf, *o. c.,* pp. 21, 22.

11. Cf. chapter VII.

12. E. g., vicariate apostolic. Cf. cc. 293, § 1, 294, § 1; cf. also c. 198, § 1.

13. Cf. c. 501, § 1.

14. "Ius ipsis et officium est gubernandi . . . cum potestate legislativa," etc.; cf. Gerald A. Ryan, *Principles of Episcopal Jurisdiction* (Washington, 1939), pp. 77-144.

15. "Vetito clausulam irritantem una Sedes Apostolica addere potest."

16. Cf. Alaphridus Ottaviani, *Institutiones iuris publici Ecclesiastici,* I, 264-280; cf. also I, 78-88.

17. Cf. p. 9.

18. Grandclaude, E. *Ius Canonicum* (Parisiis, 1882), pp. 129-130. "Generatim possunt [Episcopi] determinare ea quae sunt juxta aut praeter ius commune, nihil autem quod sit contra ius illud."

19. Ryan, *o. c.,* p. 133.

20. *Ibid.,* pp. 133-134.

21. *Ibid.,* pp. 138-139.

22. *De synodo dioecesana* (Romae, 1767), lib. IX, cap. 1.

23. Cf. Ottaviani, *o. c.,* I, 460-463.

24. Cf. Ryan, *o. c.,* p. 133; also Grandclaude, *o. c.,* p. 130, on earlier legislation.

25. Cf. c. 2247, § 1.

26. Cf. c. 293, § 2.

27. Cf. c. 294, § 1.

28. Cf. cc. 429-444, where the Code speaks of the vacant and impeded See and of the vicar-capitular.

29. Cf. c. 309.

30. Cf. p. 69.

31. C. 315, § 1. C. 314, however, provides for particular adjustments.

32. C. 316, § 1.

33. C. 319, § 1.

34. Cf. c. 291, § 2.

35. Cf. T. Lincoln Bouscaren, *The Canon Law Digest* (Milwaukee, 1934), cc. 291, 838.

36. Cf. c. 198, § 1.

37. C. 357, § 1.

38. An analysis of the power of the vicar-general can be found and studied in commentaries, e. g., Wernz-Vidal, *De personis* (Romae, 1923), pp. 677-679.

39. Cf. c. 430, § 1.

40. Cf. c. 431, § 1.

41. Cf. c. 432, § 1.

42. Cf. c. 427.

43. ". . . Ad vicarium capitularem transit ordinaria episcopi iurisdictio . . . exceptis iis . . . eidem prohibita."

44. Cf., e. g., c. 1 *de rebus ecclesiae non alienandis,* III, 9 in VI°; S. C. Ep. et Reg. *Pontis Curvi,* 14 June, 1788, *Fontes,* n. 1882.

45. E. g., cc. 113; 357; 406, § 1; 454, § 3; 455, § 2, 3°; 492; 686, § 4; 893, § 1; 958, § 1, 3°; 1432, § 2; 1487, § 1; 1573, § 5; 1590, § 1.

46. Cf. p. 63.

47. Grandclaude, *o. c.,* p. 132, says that the chapter can legislate in urgent necessity. His opinion of the use of the power which devolves upon the chapter during the vacancy of a see is worth quoting: "Capitulum dioecesim, juxta leges existentes, gubernare debet: sicuti per accidens et temporaliter tantum sortitur potestatem gubernativam . . . ita nihil abrogare aut innovare debet, nisi pro circumstantiis aliquod statutum evadat necessarium."

48. Cf. p. 75.
49. Cf. Franciscus X. Wernz and Petrus Vidal, *De religiosis* (Romae, 1933), p. 108.
50. Q. v.
51. Cf. c. 615.
52. Cf. c. 618, § 1.
53. *Regula et Constitutiones Generales Fratrum Minorum* (Quaracchi, 1922).
54. Cf. *Regula,* etc., n. 514.
55. *Constitutiones Fratrum S. Ordinis Praedicatorum* (Romae, 1932).
56. Cf. *Constitutiones,* etc., n. 513.
57. *Sancti Benedicti Regula monasteriorum,* 3rd ed. (Friburgi Brisgoviae, 1935).
58. Cf. cap. III, *de adhibendis ad consilium Fratribus.*
59. *De religiosis,* p. 109.
60. *De iure religiosorum,* 2nd ed. (Taurini-Romae, 1925), p. 67.
61. *De Religiosis,* 2nd ed. (Münster, 1931), p. 183.
62. *Epitome Iuris Canonici,* 5th ed. (Mechliniae-Romae, 1933), I, 441.
63. *Ibid.,* p. 443.
64. *Ibid.,* p. 444.
65. *O. c.,* II, 48-49.
66. *O. c.,* III, 108.
67. *Ibid.,* III, 113.
68. *O. c.,* p. 134.
69. D. Bouix, *Tractatus de iure regularium* (Parisiis, 1882), pp. 408-410.
70. C. 3, *de privilegiis,* V, 7 in VI°. Writing of the power of Abbots in their own abbeys, Pope Alexander IV says: " . . . in quos Ecclesiasticam et quasi-episcopalem jurisdictionem obtinent."
71. Vermeersch-Creusen, *o. c.,* I, 443.

CHAPTER IV ——

1. " . . . Actum esse nullum aut inhabilem esse personam expresse vel aequivalenter statuitur."
2. E. g., Cance, *o. c.,* p. 48; Cocchi, *o. c.,* I, 88-89.
3. C. 21: "Leges latae ad praecavendum periculum generale, urgent, etiamsi in casu peculiari periculum non adsit."
4. E. g., law of moral persons, procedural formalities, testaments, etc.
5. C. II, 3, 6: "Pacta, quae contra leges constitutionesque vel contra bonos mores fiunt, nullam vim habere indubitati iuris est."
6. Tit. IX: "Ne curialis praedium alterius conducat aut fideiussor conductoris existat."
7. "Hac perpetuo lege valitura sancimus, conducendi quoque fundos alienos licentiam curialibus amputari," etc.
8. "Quod ad omnes legum interpretationes tam veteres quam novellas," etc.
9. "Tantum prohibuisse sufficiat . . . licet legislator fieri prohibuisset tantum, nec specialiter dixerit, inutile debere esse, quod factum est."
10. Suárez, for instance, considers Justinian's law a compendium of the law of Theodosius II. Cf. *o. c.,* lib. V, cap. XXVIII, nn. 2, 5.
11. C. I, 14, 5.
12. *O. c.,* lib. V, cap. XXVIII, n. 4.

13. *Commentaria* (Venetiis, 1590), lib. I Codicis Justiniani ad tit. XIV, nn. 1-3.

14. "Quando aut lex procedit affirmando et valet . . . aut lex procedit ultra dando modum infirmandi et infirmabit illo modo" (*l. c.*, n. 21).

15. *Opera omnia* (Frankfurti et Lipsiae, 1743), v. XI, disp. XXVII, cap. II, n. 68: "Omne quod contra leges est, nullum est."

16. *Collectanea ex doctoribus tum priscis tum neotericis in Codicem Justiniani*, (Lugduni, 1657), ad legem "non dubium," pp. 128-129.

17. Notetur ad hoc [prohibuisse sufficiat] quod omnis lex habet tacitam clausulam decreti irritantis circa actum contrarium" (p. 129).

18. "Ut legis latori, quod fieri non vult, tantum prohibuisse sufficiat."

19. "Non solum nullus est et inutilis, sed etiam habetur pro non facto et sic ipso iure nullus est" (*o. c.*, p. 129).

20. *Apparatus Eruditionis ad Jurisprudentiam Ecclesiasticam* (Bononiae, 1754), pars I, cap. II, p. 33.

21. *O. c.*, lib. I, tit. II, p. 133.

22. C. 13, C. XXV, q. 2.

23. "Ergo vi huius legis, nisi aliunde constet, quod legis lator voluerit tantum prohibere et non irritare, consendum est, eum prohibendo, simul velle irritare."

24. *O. c.*, lib. V, cap. XXVIII.

25. *Ibid.*, n. 1.

26. *Ibid.*, nn. 2, 3.

27. "Non dubium est in legem committere eum, qui verba legis amplexus, contra legis nititur voluntatem."

28. "Et ideo inquit non dixisse imperatorem: Quod ad omnes leges trahi imperamus, sed dixisse: Quod ad omnes etiam legum interpretationes trahi generaliter imperamus."

29. *O. c.*, lib. V, cap. XXVIII, n. 3.

30. Cf. *ibid.*, n. 13.

31. "Ut legis latori, quod fieri non vult, tantum prohibuisse sufficiat."

32. *O. c.*, lib. I, tit. II, q. 133.

33. "Sic saepe actus dicitur nullus, non quia revera nullus est ipso iure, sed quia ope exceptionis et sententiae a judice latae fieri nullus debet a puncto in quo factus, casu quo capax sit huius irritationis et poenae."

34. "Si quae irritatio ipso facto in ea lege contenta, cum sit irritatio poenalis, expectanda declaratio criminis, non secus ac in aliis poenis ipso iure impositis."

35. Cf. chapter I.

36. C. 13, C. XXV, q. 2.

37. *R. J.* 64 in VI°.

38. *O. c.*, lib. V, cap. XXIX, n. 3.

39. *O. c.*, reg. 64.

40. E. g., marriage with simple vows of chastity, reg. 64, n. 10.

41. *O. c.*, "lex nihil frustra agit" (n. 13).

42. "Contra ius fiunt: (1) ea quae fiunt contra iuris formam; (2) quae menti legis latoris resistunt; (3) ea sententia quae contra solitum judiciorum ordinem proferatur" (n. 1).

43. "Quando lex vel statutum prohibet fieri actum vel contractum, licet non procedat ultra annullando, tamen est actus nullus, quia lex prohibitiva simpliciter loquens, semper consetur habere clausulam annullativam actus et ita non est necesse, quod lex ultra annullet."

44. *O. c.,* p. 129.

45. C. 45, *de electione et electi potestate,* V, 6 in VI°.

46. "Inhibentes, ne . . . et decenentes, si secus super hoc a quodam scienter vel ignoranter attentatum exstiterit, irritum et inane."

47. *Tractatus Varii: IV de clausulis usufrequentioribus,* clausula XL #2.

48. *O. c.,* vol. I, disp. VIII, cap. IV, n. 37: "Defectus formae, quantumvis modicus, actum reddit ipso iure invalidum."

49. "Quando lex simpliciter prohibet aliquem actum et non addit clausulam irritantem, actus legi contrarius non est irritus sed tantum illicitus": *Candidatus Jurisprudentiae* (Augustanae, 1733), vol. I, tit. II, *de constitutionibus,* n. 70.

50. C. 16, X, *de regularibus et transeuntibus ad religionem,* III, 31.

51. . . . tantum prohibuisse sufficiat."

52. "Odia restringi, et favores convenit ampliari" (*R. J.* 15 in VI°).

53. "non dubium," C. I, 14, 5; "pacta quae," C. II, 3, 6.

54. "Contra eum, qui legem dicere potuit apertius, est interpretatio facienda" (*R. J.* 57 in VI°).

55. *O. c.,* pp. 177-178; see also, Pichler, *Epitome,* pp. 55-59.

56. *L. c.*

57. *Commentarium in quinque libros decretalium* (Venetiis, 1729), c. 7, X, *de constitutionibus,* I, nn. 27-30.

58. Cf. Sess. XXIV, *de reformatione Matrimonii,* c. 1.

59. *L. c.*

60. *O. c.,* lib. V, cap. XXV, XXVIII, XXIX.

61. Among others Suárez cites Bartolus, Panormitanus, and Covarruvias, (*l. c.,* n. 2).

62. Suárez cites as holding this opinion, Sylvester, Hostiensis, Joannes Andreas, (*l. c.,* n. 4).

63. Nn. 12-14.

64. "Alio vero modo loqui possimus de verbo prohibendi ut ampliato, seu extenso per legem aliquam humanam constituentem regulam generalem sic interpretantem juridice sensum legis prohibentis, ut vim habeat irritantis, etiamsi per solum verbum prohibendi sine additione clausulae irritantis feratur."

65. *L. c.,* n. 13.

66. *Ibid.*

67. *R. J.* 57 in VI°: "Contra eum, qui legem dicere potuit apertius, est interpretatio facienda"; *R. J.* 30 in VI°: "In obscuris minimum est sequendum."

68. "Quia superior prohibet actum, non potest illi subditus resistere, quin peccet, et similiter si superior irritat actum, non posset illum valide efficere" (*l. c.,* n. 14).

69. *O. c.,* lib. V, cap. XXIX.

70. *O. c.,* v. VII, *R. J.* 64 in VI°.

71. "Quae contra ius fiunt, debent utique pro infectis haberi."

72. E. g., c. 1, X, *de Matrimonio contracto contra interdictum ecclesiae,* IV, 16; c. un., *de voto et voti redemptione,* III, 15 in VI°.

73. C. 28, C. VII, q. 1; c. 10, C. IX, q. 2.

74. "Quidquid agitur contra ius, id est, contra canonem, aut legem, qua actus irritatur vel nullus declaratur, aut illius forma substantialis praescribitur, invalidum est, et pro infectis habetur" (*R. J.* 64 in VI°, n. 7).

75. *O. c.,* lib. I, tit. II, q. 133.

76. *Institutiones iuris Ecclesiastici,* lib. III, § cclvii, f.

77. "Lex prohibens vel praecipiens utrumque forum afficiat."

78. "Perspicacia opus est in expendenda lege irritante ut appareat quid disponat et quatenus valorem actus tollat."

79. "Lex irritans directe vel indirecte vim suam retinet etsi invincibiliter ignoretur, aut necessitas valide agendum superveniat."

80. E. g., Zallinger, *l. c.*

81. E. g., Reiffenstuel, *o. c.*, lib. I, tit. II, XI, n. 243.

82. E. g., Maroto, Coronata, Blat, Ojetti, *o. c.*, p. 167; cf. also Cocchi, *o. c.*, I, 88-89; Cance, *o. c.*, p. 48.

83. E. g., Toso, Leitner, Cicognani, *o. c.*, p. 168.

84. *O. c.*, p. 168.

85. *O. c.*, p. 237.

86. Cf. Reiffenstuel, *l. c.*

87. *O. C.*, v. I. disp. VIII, cap. IV, n. 37: "defectus formae, quantumvis modicus, actum reddit ipso iure invalidum."

88. *O. c., de testamentis,* cap. IX, n. 4.

89. *Ibid.*, n. 13: "Per leges civiles non potest quis sine solemnitate iuris testari, cum ab eo potentia auferatur. Colligitur ergo parum eius voluntatem prodesse, quantumcumque ea manifesta sit."

90. *O. c.*, Rubrica I, questio I, n. 15: "Nullitas est vitium seu defectus rei gestae proveniens ob legis transgressionem."

91. *O. c., R. J.* 64 in VI°.

92. C. 22, X, *de rescriptis,* I, 3; c. 42, X, *de electione et electi potestate,* I, 6; c. 2, X, *de rebus ecclesiae alienandis vel non,* III, 13.

93. Cf. X, *de testamentis et ultimis voluntatibus,* III, 26.

94. Chapters XXXI and XXXII.

95. *O. c.*, lib. V, cap. XXXI, n. 8.

96. C. 22, X, *de rescriptis,* I, 3.

97. "Quum enim in litteris nostris eisdem principaliter mandaretur . . . propter quod processum ipsorum contra nostri formam rescripti ac iuris ordinem attentatum irritum decernimus et inane."

98. Cf. c. 203, § 2: "Hos tamen excessisse non intelligitur delegatus, qui alio modo ac deleganti placuerit, ea ad quae delegatus est, peragit, nisi modus ipse fuerit a delegante praescriptus tanquam conditio"; canon 203, § 1, states that a delegate acts invalidly if he exceeds his mandate; cf. also c. 55.

99. C. 1, *de sententia excommunicationis, suspensionis et interdicti,* V, 11 in VI°.

100. Cf. c. 203.

101. *The Principles of Delegation* (Washington, 1929), p. 106; cf. also c. 39.

102. *O. c.*, lib. V, cap. XXXII.

103. *Ibid.*, n. 2.

104. C. 4, X, *de his quae fiunt a praelato sine consensu capituli,* III, 10.

105. " . . . si quae amodo feceris, auctoritate apostolica cassamus."

106. Cf. c. 105, 1°.

107. Cf. c. 555, § 1.

108. Cf. c. 1094.

109. Cf. c. 729.

110. "Leges latae ad praecavendum periculum generale, urgent, etiamsi in casu peculiari periculum non adsit."

111. *O. c.,* I, 347.
112. *O. c.,* lib. V, cap. XXIV, n. 3.
113. *Ibid.,* cap. XXIII.
114. *Ibid.,* n. 3.
115. *O. c.,* p. 301.
116. *Ibid.,* pp. 301-302; cf. also Maroto, *o. c.,* pp. 257-258.
117. Cf. Van Hove, *o. c.,* p. 302, for his discussion of examples where the use of epicheia is asserted.

CHAPTER V ——

1. Cf. e. g., Michiels, *o. c.,* I, 125; Cicognani, *Commentarium,* pp. 67-68; Maroto, *o. c.,* pp. 216-220, 240.
2. Cf. chapter II.
3. "Licet legis lator fieri prohibuisset tantum," etc.; "Tantum prohibuisse sufficiat."
4. "Illud quoque cassum atque inutile esse praecipimus." The same text is used by Justinian and Theodosius II.
5. *O. c.,* lib. V, cap. XXVIII, n. 6.
6. Cf. c. 16, § 1.
7. Cf. c. 157.
8. *O. c.,* p. 165.
9. Cf. c. 2232, § 1.
10. E. g., Michiels, *o. c.,* I, 269.
11. Cf. *ibid.,* footnote 2.
12. Cf. chapter II.
13. *O. c.,* I, 269.
14. Cf. chapter II.
15. *O. c.,* I, 270, footnote.
16. *O. c.,* p. 239; "lex irritans ferendae sententiae et pariter illa quae actus rescindibiles," etc.
17. *O. c.,* p. 165.
18. "Si quis bona ecclesiastica cuiuslibet generis . . . ad alia quaelibet inhabilis efficiatur. . . ."
19. *O. c.,* lib. I, tit. II, § XI, n. 245: "Certum insuper est eum valiturum donec per sententiam rescindatur."
20. C. 18, X, *de praebendis et dignitatibus,* III, 5.
21. "Multa per patientiam tolerentur, quae, si deducta fuerint in judicium, exigente justitia non debeant tolerare."
22. "Quod litterae commissoriae tanquam per subreptionem obtentae carerent pondere firmitatis."
23. Cf. c. 103, § 2: "Actus positi ex metu gravi et iniuste incusso vel ex dolo, valent, nisi aliud iure caveatur; sed possunt ad normam can. 1684-1689 per iudicis sententiam rescindi, sive ad petitionem partis laesae sive ex officio."
24. *O. c.,* n. 255.
25. "Licentia legitimi Superioris sine qua alienatio invalida est." Cf. Cleary, *o. c.,* p. 65.
26. C. 42, X, *de electione et electi potestate,* I, 6.
27. "Aliter electio facta non valeat nisi forte communiter esset ab omnibus, quasi per inspirationem absque vitio celebrata."
28. *O. c.,* nn. 257-259.

29. Cf. c. 2232, § 1.

30. *O. c.,* n. 251, 253.

31. Cf. civil law on testaments as accepted by canon law.

32. "In ultimis voluntatibus in bonum Ecclesiae serventur, si fieri possit, solemnitates iuris civilis. . . ."

33. ". . . Hae si omissae fuerint, heredes moneantur ut testatoris voluntatem adimpleant."

34. This obligation is thoroughly discussed by Jerome D. Hannan in *The Canon Law of Wills* (Washington, 1934), pp. 283-301. Cf. also Henry A. Ayrinhac, *Administrative Legislation in the New Code of Canon Law* (New York, 1930), pp. 414-416; Marius Pistocchi, *De Bonis Ecclesiae Temporalibus* (Taurini, 1932), pp. 251-252.

35. Cf. Hannan, *o. c.,* p. 283; Pistocchi, *o. c.,* p. 250.

36. *O. c.,* p. 171.

37. Cf. c. 16, § 1; cf. also, Van Hove, *o. c.,* p. 172.

38. Prosdocianus Cerato, *Censurae vigentes* (Patavii, 1921), pp. 7, 48-53, 246; Felix Cappello, *De censuris* (Taurinorum Augustae, 1925), pp. 47-65; Jacobus Sole, *De delictis et poenis* (Romae, 1920), pp. 13-30. These authors do not insist on the application of the excuse of ignorance to invalidating penal laws, but it is useful to know this doctrine, as obvious deductions can be made.

39. Cf. Suárez, *o. c.,* lib. V, cap. XX, n. 7.

40. *Ibid.,* cap. XXI, n. 2.

41. Cf. pp. 75-76.

42. Cf. Suárez, *l. c.*

43. Cf. cc. 1892-1897.

44. Cf. chapter VIII.

## CHAPTER VI ——

1. Cf. Suárez, *o. c.,* lib. V, cap. XXII.

2. Cf. e. g., Michiels, *o. c.,* I, 362-363; Cicognani, *Commentarium,* p. 113.

3. § 1: "Nulla ignorantia legum irritantium aut inhabilitantium ab eisdem excusat, nisi aliud expresse dicatur."

4. *O. c.,* p. 362.

5. *O. c.,* p. 172.

6. Cf. *ibid.,* pp. 241-242 commenting on Michiels, *o. c.,* p. 364.

7. *O. c.,* I, 365.

8. Cf. c. 2202, § 1.

9. E. g., c. 1075.

10. C. 2202, § 2.

11. "In errore communi . . . iurisdictionem supplet Ecclesia," etc.

12. "Si confessarius, ignorans reservationem, poenitentem a censura ac peccato absolvat, absolutio censurae valet, dummodo," etc.

13. ". . . acatholici sive baptizati sive non baptizati, si inter se contrahunt, nullibi tenentur ad catholicam matrimonii formam servandam," etc.

14. *Commentaria minora,* I, 46.

15. *O. c.,* p. 241.

16. "Actus positi ex metu gravi et iniuste incusso vel ex dolo, valent, nisi," etc.

17. *O. c.,* lib. V, cap. XXII, n. 7.

18. E. g., simony, disqualifications, lack of substantial form, etc. (*ibid.*, nn. 7-8).

19. "Leges latae ad praecavendum periculum generale, urgent, etiamsi in casu pecullariari periculum non adsit."

20. "Nec potest quis renuntiare, aut derogare communi bono, cedendo proprio" (*l. c.*, n. 9.).

21. Cf. *l. c.*, lib. V, cap. XXIII.

22. "In dubio autem facti potest Ordinarius in eis dispensare, dummodo agatur de legibus in quibus Romanus Pontifex dispensare solet."

23. Cf. Van Hove, *o. c.*, p. 237.

24. Cicognani, *Commentarium*, p. 108.

25. Cf. Van Hove, *o. c.*, p. 234. Van Hove says a doubt of law is primarily concerned with the extension of the law, secondarily with its existence and permanence. Maroto, *o. c.*, p. 243, seems to consider all forms of doubt of law as equal. The question is of no practical importance since canon 15 makes no distinction.

26. Cf. Cicognani, *Commentarium*, p. 107.

27. Cf. *ibid.*; cf. also, Van Hove, *o. c.*, p. 236.

28. *O. c.*, p. 236.

29. "Leges, etiam irritantes et inhabilitantes, in dubio iuris non urgent. . . ."

30. *R. J.* 57 in VI°: "Contra eum, qui legem dicere potuit apertius, est interpretatio facienda."

31. *Commentarium*, p. 109.

32. *O. c.*, I, 335.

33. For a commentary on Rule 57, see Reiffenstuel, *o. c.*, reg. LVII; Vittorio Bartocetti, *Le Regole Canoniche* (Rome, 1929), pp. 158-159.

34. Cf. Maroto, *o. c.*, p. 243.

35. Cf. Michiels, *o. c.*, I, 335, and Van Hove, *o. c.*, p. 236, for a discussion of incorrect interpretations of canon 15. Van Hove particularly calls attention to the asserted connection between canon 15 and canon 23 as taught by Albert Blat in *Commentarium* (Romae, 1919-1923), Vol. I, n. 72, p. 92.

## CHAPTER VII ——

1. E. g., "dummodo," cc. 750, § 2; 777, § 2; 804, § 2; "nequit," cc. 116; 216, § 4; 236, § 4.

2. E. g., cc. 622, § 2; 1265, § 2; 1268, § 1; 1287, § 1; 2272, § 1; 2275, 1°.

3. E. g., cc. 177, § 2; 2212, § 2.

4. E. g., c. 900.

5. "Pars tertia: de poenis in singula delicta."

6. Graf, *o. c.*, pp. 39-41, records as clearly invalidating clauses with their variations, "nullum esse, irritum, inhabilis, valere (non valere), dirimere, vim habere (vi carere) effectum non sortiri, sub poena nominationis initae, capax, ut quis sit patrinus, non sustinere, pro infectis habere, nihil agere, nihil est actum, fructus non facere suos"; Van Hove, *o. c.*, p. 168, gives as examples of expressly invalidating clauses, "Actus est nullus, Matrimonii promissio irrita est, inhabiles sunt"; Van Hove gives as examples of equivalent clauses: "Impedit quominus valide contrahatur; dari nequit; effectus suos non sortiuntur; nullum iuridicum effectum; nihil est actum; novitiatus ut valeat; ut quis sit patrinus." Cf. also, Michiels, *o. c.*, I, 275-276; Cicognani, *Commentarium*, p. 91.

7. E. g., cc. 164; 181, § 4; 195; 632; 1429, § 3; 1453, § 1; 1462.

8. Cc. 232, § 2; 827; 855, § 1; 1264, § 1; 1269, § 2; 1640, § 1; 2012, § 2; 2145, § 1. Graf, *o. c.,* pp. 41-45, records as doubtfully invalidating clauses: "arceri, dummodo, exclusum est (excludi), debere, necesse (necessarium esse), requiri, exigi, indigere, nefas, nequire (non posse)."

9. Cc. 954; 1294, § 2; 1531, § 1; 1706; 1760, § 2.

10. Cf. c. 39.

11. Cc. 750, § 2; 777, § 2; 804, § 2; 838, § 1; 1258, § 2; 1265, § 1; 1731, 2°; 1781; 2077; 2151; 2259, § 2.

12. C. 783, § 2.

13. Cf. chapter I.

14. *O. c.,* lib. V, cap. XXXI, nn. 9-12.

15. *O. c.,* p. 168.

16. "Confessarius ordinarius non potest renuntiari extraordinarius nec . . . rursus deputari ordinarius in eadem communitate, nisi post annum ab expleto munere."

17. Cf. c. 108, § 3.

18. Cf. cc. 8, § 2; 14; 201.

19. E. g., "nequit valide, valide non potest," etc.

20. But cf. c. 203, § 2.

21. E. g., c. 492, § 1.

22. E. g., c. 1424.

23. Cc. 116; 216, § 4; 236, § 4; 388; 452, § 1; 454, § 3; 498; 524, § 2; 547, § 4; 915; 991, § 3; 1423, § 2, § 3; 1429, § 1, § 2; 1430, § 1; 1488; 1536, § 4; 1545; 1941, § 3; 2223, § 1.

24. E. g., c. 1287, § 1.

25. C. 1530, § 1, 1°, 2°, § 2.

26. E. g., cc. 51, 266, 274; 924, § 2; 2302.

27. Cf. cc. 2195-2213.

28. Cf. cc. 2214-2313.

29. "Qui infamia iuris laborat non solum . . . sed insuper est inhabilis ad obtinenda beneficia, pensiones, officia et dignitates ecclesiasticas, ad actus legitimos ecclesiasticos perficiendos," etc.

30. Cf. c. 1573, § 2.

31. "Exceptis dignitatibus, ad Episcopum pertinet . . . reprobata quavis contraria consuetudine. . . ."

32. "Reprobata quavis contraria consuetudine, sacerdos celebrans accurate ac devote servet rubricas," etc.

33. Cf. e. g., cc. 343, § 2; 409, § 2; 1181.

34. "In omnibus rescriptis subintelligenda est, etsi non expressa, conditio: *Si preces veritate nitantur,* salvo praescripto can. 45, 1054."

35. Cf. cc. 42, 45, 1054.

36. "Conditiones in rescriptis tunc tantum essentiales pro eorundem validitate consentur, cum per particulas *si, dummodo,* vel aliam eiusdem significationis exprimuntur."

37. C. 1529: "Quae ius civile in territorio statuit de contractibus . . . et de solutionibus, eadem iure canonico in materia ecclesiastica iisdem cum effectibus serventur, nisi iuri divino contraria sint aut aliud iure canonico caveatur."

38. Cf. c. 1070, § 1.

39. Cf. c. 1067, § 1; cf. also § 2.

CHAPTER VIII ——

1. Cf. cc. 1892, 1894.

2. Cc. 1679-1683; cf. also c. 1534, § 2; c. 1603, § 1, 1°.

3. Cc. 1892-1897; cf. also c. 1603, § 1, 3°.

4. E. g., Joseph Noval, *Commentarium Codicis Iuris Canonici: De processibus* (Augustae Taurinorum, 1920), pp. 213-220; 435-439; Franciscus Roberti, *De processibus* (Romae, 1926), I, 376-381; II, 219-235; Coronata, *o. c., De processibus,* III, 114-117; 334-339; Cocchi, *o. c., De processibus,* IV, 160-162; 378-381; Cappello, *Summa Iuris Canonici* III, 156-158; 277-282; Alphonsus De Meester, *Iuris Canonici et Iuris Canonico-Cicilis compendium* (Brugis, 1928), III, 41-42; 66-67; Wernz-Vidal, *De processibus* (Romae, 1927), pp. 262-265; 567-573; Eduard Eichmann, *Das prozessrecht des Codex Iuris Canonici* (Paderborn, 1921), pp. 113-114.

5. "Si actus aut contractus sit ipso iure nullus, datur ei, cuius interest, actio ad obtinendam a iudice declarationem nullitatis. Cf. Eichmann, *o. c.,* p. 113.

6. Noval, *o. c.,* p. 215.

7. Cappello, *Summa Iuris Canonici,* III, 156, rightly warns that this interest must be proven.

8. "Nullitas actus tunc tantum habetur, cum in eo deficiunt quae actum ipsum essentialiter constituunt, aut solemnia seu conditiones desiderantur a sacris canonibus requisitae sub poena nullitatis."

9. *O. c.,* pp. 215-217.

10. *O. c.,* I, 378; cf. also Coronata, *o. c.,* III, 115; Wernz-Vidal, *De processibus,* p. 263.

11. "Nullitas alicuius actus non importat nullitatem actorum qui praecedunt aut subsequuntur et ab actu non dependent."

12. Cf. Roberti, *o. c.,* I, 377; cf. also, Wernz-Vidal, *De processibus,* p. 263.

13. Cf. cc. 1723; 1892, 3°.

14. Cf. cc. 1585, § 1; 1587, § 1; cf. also Roberti, *o. c.,* p. 379; Wernz-Vidal, *De processibus,* p. 264.

15. "Nullitas actus a iudice declarari non potest ex officio, nisi aut publice id intersit, aut agatur de pauperibus vel de minoribus aliisve qui minorum iure censentur."

16. Cf. Coronata, *o. c.,* III, 116; Coronata cites Augustine, *o. c.,* VII, 131.

17. *L. c.*

18. "Iudex inferior de confirmatione, a Romano Pontifice actui vel instrumento adiecta, videre non potest, nisi Apostolicae Sedis praecesserit mandatum."

19. Cf. Coronata, *o. c.,* III, 116.

20. Coronata, *o. c.,* III, 117.

21. Coronata, *l. c.*

22. Cf. authors named in this chapter on the difference between "confirmatio utilis" and "confirmatio inutilis"; between "confirmatio in forma communi" and "confirmatio in forma specifica." Cf., e. g., Wernz-Vidal, *De processibus,* p. 265; Coronata, *o. c.,* III, 117; Cappello, *o. c.,* p. 158. It is generally held that a judge lower than the Roman Pontiff is incompetent to act only if the confirmation is "in forma specifica." This is the form which validates the defects of an act which can be validated and which the Roman Pontiff is presumed to wish to validate. "Conformatio in forma specifica" is usually identified by the clauses "certa scientia, motu proprio," etc.; cf. c. 45; for commentary on the decretal law, see Reiffenstuel, Schmalzgrueber, De Angelis, etc., X, *de confirmatione utili vel inutili,* II, 30. It will be useful also to study the law and commentary X, *de probationibus,* II, 19.

23. C. 1681: "Qui actum posuit nullitatis vitio infectum, tenetur de damnis et expensis erga partem laesam."

24. Cf. Noval, *o. c.,* p. 218.

25. Cf. e. g., Noval, *o. c.,* p. 218; Cappello, *Summa Iuris Canonici,* III, 158; Coronata, *o. c.,* III, 116; Roberti, *o. c.,* I, 378.

26. *O. c.,* III, 116.

27. Cf. chapter VI.

28. *O. c.,* p. 435.

29. *De processibus,* II, 223.

30. *O. c.,* VI, 567-568; cf. also Vermeersch-Creusen, *o. c.,* III, 118.

31. *O. c.,* III, 277-278.

32. "Sententia vitio insanabilis nullitatis laborat, quando: (1°) Lata est a iudice absolute incompetente vel in tribunali collegiali a non legitimo iudicum numero contra praescriptum can. 1576, § 1: (2°) Lata est inter partes, quarum altera saltem non habet personam standi in iudicio; (3°) Quis nomine alterius agit sine legitimo mandato.

33. "Lata est a iudice absolute incompetente."

34. "In causis de quibus in can. 1556, 1557, aliorum iudicum incompetentia est absoluta." Canon 1556 states that no one can judge the Roman Pontiff. Canon 1557 gives a list of persons, physical and moral, whose trials are reserved to the Pope or to the tribunals of the Holy See.

35. "vel in tribunali collegiali a non legitimo iudicum numero contra praescriptum. c. 1576, § 1."

36. The cases indicated in c. 1576, § 2, are not contemplated in c. 1892, 1°. Cf. Wernz-Vidal, *De processibus,* p. 568.

37. "Lata est inter partes, quarum altera saltem non habet personam standi in iudicio."

38. Cf. c. 1654.

39. Cf. Roberti, *o. c.,* II, 226-227, for list of those excluded from court. Roberti considers this topic both in regard to complete exclusion and in regard to partial exclusion from court.

40. "Quis nomine alterius egit sine legitimo mandato."

41. Cf. especially cc. 1659, 1662.

42. *Summa Iuris Canonici,* pp. 278-279.

43. *O. c.,* II, 228-230.

44. "Cuilibet processui interesse oportet notarium . . . ; adeo ut nulla habeantur acta, si actuarii manu non fuerint exarata, vel saltem ab eo subscripta."

45. "Si novas probationes admittendas censeat, id decernat iudex, audita altera parte, cui congruum tempus concedat ut novas probationes cognoscere et se defendere possit; aliter iudicium nullius est momenti." This example is offered by Roberti, *o. c.,* II, 229.

46. "Nullitas de qua in can. 1892 proponi potest per modum exceptionis in perpetuum. . . ."

47. Noval, *o. c.,* p. 436, cites the example of the defect of mandate.

48. "per modum vero actionis coram iudice qui sententiam tulit intra triginta annos a die publicationis sententiae."

49. Cf. Noval, *o. c.,* p. 436; Wernz-Vidal, *De processibus,* p. 569.

50. 1°. "Legitima defuit citatio."

51. Cf. cc. 1711, § 1; 1712.

52. C. 1711, § 2.

53. 2°. "Motivis seu rationibus decidendi est destituta, salvo praescripto can. 1605"; cf. c. 1874, § 4.

54. 3°. "Subscriptionibus caret iure praescriptis."

55. Cf. c. 1874, § 5; cf. also Wernz-Vidal, *De processibus,* p. 572.

56. 4°. "Non refert indicationem anni, mensis, diei et loci quo prolata fuit"; cf. c. 1874, § 5.

57. "Querela nullitatis in casibus de quibus in can. 1894 proponi potest vel una cum appellatione intra decendium."

58. "vel seorsim et unice qua querela intra tres menses a die publicationis sententiae coram iudice qui sententiam tulit."

59. Cf. Noval, *o. c.,* p. 438. Canonists do not agree as to whether a plea of nullity attacking an invalid sentence passed by a delegated judge should be placed before him or before the one who delegated him. The arguments for placing this plea before the delegated judge are that the Code makes no distinction and that his commission is not completed until his sentence is valid. The argument for placing the plea before the delegator is that any sentence completes the commission. The former argument seems the better one, for an invalid sentence is not contemplated by the delegator. Cappello, *Summa Iuris Canonici,* III, 279, holds the former opinion. Wernz and Vidal (*De processibus,* pp. 569-570) hold the second opinion. While Roberti (*o. c.,* II, 232) holds the former opinion, he says that if the plea of nullity is not placed for some time and the plea concerned the entire process, it may be better to file the plea before the Ordinary, who will determine whether the delegated judge or others will rule on the plea itself.

60. C. 1897, § 1: "Querelam nullitatis interponere possunt nedum partes, quae se gravatas putant, sed etiam promotor iustitiae aut defensor vinculi, quoties iudicio interfuerunt."

61. C. 1897, § 2: "Imo ipse iudex potest ex officio sententiam nullam a se latam retractare et emendare intra terminos ad agendum supra statutos." Cf. Roberti, *o. c.,* II, 225.

62. Cf. Wernz-Vidal, *De processibus,* pp. 572-573.

63. "Si pars vereatur ne iudex, qui sententiam, querela nullitatis impugnatam, tulit, praeoccupatum animum habeat et proinde eum suspectum merito existimet, exigere potest ut alius iudex, sed in eadem iudicii sede, in eius locum subrogetur ad normam can. 1615."

64. Cf. Noval, *o. c.,* p. 438; Wernz-Vidal, *De processibus,* p. 569.

65. Canon 1614 is not applicable here because canon 1896 does not demand that the suspicion which is the basis for the refusal of a judge or court be proved. It is, of course, to be understood that no injustice should be done to the judge by unwarranted fear. Canon 1896 provides for the maintenance of justice for the parties involved in cases where an invalid sentence has been passed. Prosecution of this right should not be carried out to the injury of the judge. The first canons to be used in a plea of nullity are canons 1893 and 1895. Canon 1896 is supplementary.

66. C. 1615, § 2: "Ordinarii autem est in locum iudicum qui suspecti declarati sunt, alios a suspicione immunes subrogare"; cf. also 1603, § 1, 3°.

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